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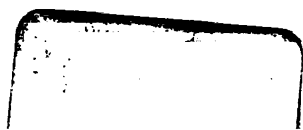
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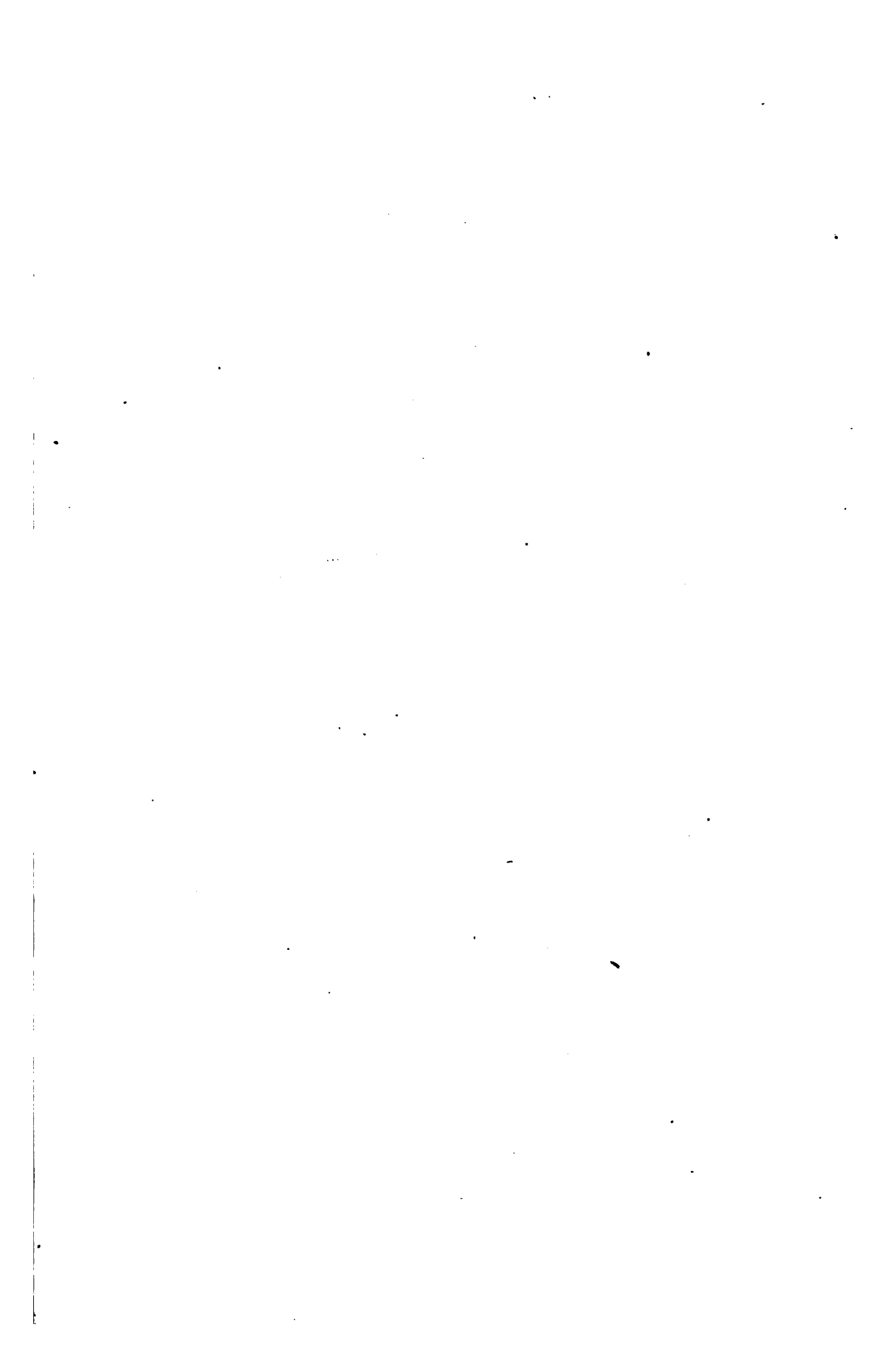
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THE AMERICAN

LAW TIMES REPORTS.

A COLLECTION OF

LEADING CASES DECIDED IN THE COURTS OF THE
UNITED STATES, AND COURTS OF LAST
RESORT OF THE SEVERAL
STATES.

TOGETHER WITH

A DIGEST OF CASES OF VALUE REPORTED IN AMERICAN
LEGAL PERIODICALS DURING THE YEAR 1877.

EDITED BY

ROWLAND COX.

"It is impossible but in process of time, as well from the nature of things changing, as corruption of agents, abuses will grow up: for which reason, the law must be kept as a garden, with frequent digging, weeding, turning, &c. That which in one age was convenient, and perhaps necessary, in another becomes an intolerable nuisance."—ROGER NORTH.

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THE
AMERICAN LAW TIMES REPORTS:

A COLLECTION OF

LEADING CASES

DECIDED IN THE COURTS OF THE UNITED STATES AND COURTS
OF FINAL APPEAL OF ALL THE STATES.

NEW SERIES. — JANUARY, 1877. — VOL. IV., No. 1.

SUPREME COURT OF MICHIGAN.

ASSESSMENT OF SEWER TAX. — WHEN ILLEGAL.

THOMAS v. GAIN, Marshal.

It is not competent to provide by law that sewer taxes shall be assessed upon lots and lands benefited according to their superficial area. If such an assessment was lawful there would be ground for a bill in equity to remove a cloud upon title.

APPEAL in chancery from St. Clair Circuit.

C. J. Walker, for complainant.

W. T. Mitchell, for defendant.

COOLEY, J. The principal question in this case is whether it is competent to provide by law that sewer taxes in a city shall be assessed upon the lots and lands benefited in proportion to their superficial area. A subordinate question is, whether, conceding such an assessment to be legal, it can be lawfully made without giving the parties concerned an opportunity to be heard.

The assessment in question was made under act No. 241, of 1875, local acts 1875, p. 3. The second section of that act provides, that, before the assessment shall be made, the common council shall, by resolution, declare what lands, lots, and premises are, and have been, benefited by the construction of the sewers respectively, and such lots, lands, and premises are then to constitute the assessment district for the purpose of assessing the cost and expense of such sewers respectively. By the fourth section it is provided that the assessment shall be made upon the lots, lands, and premises within the district, "in proportion to the number of superficial feet therein." It is further provided, that the assessment roll, when completed, shall remain on file with the city clerk for at least two weeks, at the end of which time "the same shall be a valid lien and as-

assessment upon and against the several lots and descriptions of land." No hearing on the assessment is provided for.

The principal objection made to the assessment is, that it is not apportioned among the parties benefited upon any principle recognized in the law; that it is made on a basis purely arbitrary, and consequently cannot be justified as an exercise of the taxing power. It is not claimed that an assessment by benefits would be inadmissible; but it is insisted that an assessment by the area of lots irrespective of proportionate benefits is nothing but a levy of arbitrary exactions, and therefore unconstitutional.

The proper method of levying assessments for sewers has not been much discussed by the courts. In England they have generally been laid in proportion to benefits received, estimated according to the yearly value of the lands within the district. *Brooke's case*, 5 Rep. B.; *Masters v. Scroggs*, 3 M. & S. 447; *Netterton v. Ward*, 3 B. & Ald. 21; *Stafford v. Hamston*, 2 B. & B. 691; *Loady v. Wilson*, 3 Ad. & El. 247; *Metropolitan Board of Works v. Vauxhall Bridge Co.* 7 El. & Bl. 946. In this country assessments for sewers and also for drains have generally been levied upon an estimate of special benefits. *Reeves v. Treasurer of Wood Co.* 8 Ohio St. 333; *Sessions v. Crunklinton*, 20 Ohio St. 349; *Draining Co. case*, 11 La. An. 338; *O'Reiley v. Kankakee Draining Co.* 32 Ind. 169; *Cove v. Hartford*, 28 Conn. 363; *Commonwealth v. Woods*, 44 Penn. St. 113. It was decided in Connecticut that an arbitrary assessment by the frontage of lots was unreasonable and invalid. *Clapp v. Hartford*, 35 Conn. 66. But, in Pennsylvania, assessments which charged upon lots a portion of the cost of sewers, not to exceed a certain maximum per foot front, have been sustained. *Lipps v. Philadelphia*, 38 Penn. St. 503; *Philadelphia v. Tryon*, 35 Penn. St. 401.

The assessment of sewer taxes by the superficial area is quite unusual. In the southwest levee taxes are sometimes assessed in that proportion, and the right to make such assessments has been sustained. *Daily v. Swope*, 47 Miss. 367; *Alcorn v. Hamer*, 38 Miss. 652; *Williams v. Cammach*, 27 Miss. 209; *Smith v. Aberdeen*, 25 Miss. 458; *McGehee v. Matthis*, 21 Ark. 40; *Wallace v. Shelton*, 14 La. An. 498. In the latter case it is intimated that while no basis of assessment which could be fixed upon would be absolutely just, yet, as it costs as much to protect one acre of land from overflow as it does to protect another, the apportionment by the area is not presumptively unjust. A like decision has been made in Missouri; the court's attention being directed apparently only to the question whether the assessment was such taxation as under the Constitution was required to be apportioned according to the value of property. *Egyptian Levee Co. v. Harden*, 27 Mo. 497. This decision was afterwards applied to an assessment for sewers; the court apparently being of opinion that there was no difference in principle between the cases, and discussing the subject with a bare reference to previous decisions. *St. Louis v. Creamer*, 36 Mo. 456.

It is quite evident to our minds, however, that when it has been determined that a case is one in which a special assessment may be laid, we have not got over all the difficulties that present themselves here. That is only a preliminary question, and involves only a single consideration,

namely, whether the particular burden which it is proposed to levy is or is not a tax in the meaning of that term as it is employed in the Constitution, in making provision that taxes shall be laid by the value of property. If it is a tax in the ordinary sense it must be assessed by value; if it is not a tax in that sense it must be apportioned on some other basis. But it does not follow that it may be apportioned on any basis whatsoever which the legislature may see fit to prescribe.

It has been decided in this state that an assessment of paving and similar taxes may constitutionally be made in proportion to the frontage of lots along the improvement. *Williams v. Detroit*, 2 Mich. 560; *Motz v. Detroit*, 18 Mich. 495; *Hoyt v. East Saginaw*, 19 Mich. 39. The idea that underlies statutes for this purpose is, that the benefit to the abutting lots is generally in proportion to the length of their respective front, and that as a rule this principle of apportionment is more just than any other. There is a basis of truth to this idea, and it is so generally accepted that assessments for street improvements are perhaps now more generally apportioned by the frontage than by any other standard. In *Warner v. Grand Haven*, 30 Mich. 24, it was held that the court could not say, as matter of law, that an assessment for a sewer, estimated by the foot front of abutting lots, was not laid in proportion to actual or probable benefits. In *Brown v. Springfield*, 97 Mass. 152, an assessment of benefits by the value of the lands exclusive of buildings was sustained. In several cases it has been decided that in assessing benefits the future probable advantages may be considered, as may, also, the incidental benefits equally with those which the land receives directly. See *Loady v. Wilson*, 3 Ad. & El. 247; *Hammersmith Bridge Co. v. Overseers of Hammersmith*, L. R. 6 Q. B. 230.

But it is generally agreed that an assessment levied without regard to actual or probable benefits is unlawful, as constituting an attempt to appropriate private property to public uses. This idea is strongly stated in *Lodi Water Co. v. Costar*, 18 N. J. (Eq.) 519, which has often been cited with approval in other cases. It is admitted that the legislature may prescribe the rule for the apportionment of benefits, but it is not conceded that its power in this regard is unlimited. The rule must at least be one which, it is legally possible, may be just and equal as between the parties assessed. If it is not conceivable that the rule prescribed is one which will apportion the burden justly, or with such proximate justice as is usually attainable in tax cases, it must fall to the ground, like any other merely arbitrary action which is supported by no principle.

The only discretion which the act in question allows to the common council as an assessing board is in determining what lots and lands are benefited by the improvement. When that determination is made the rule of apportionment is fixed, and it must be made according to the area. It is not required that the lands shall lie contiguous to each other, or that the benefits to be taken into the account shall be only the direct benefits to the land. We find nothing in the act to preclude the taxation of lots remote from the sewer if their market value, actual or speculative, is increased by means of it. While this increase of value might be a reason for general taxation for sewer purposes, it is manifest that it could

not possibly warrant an apportionment by superficial area, since that, under no circumstances, could be just unless limited to lands directly and peculiarly benefited. But this act makes no provision by which parties assessed may of right drain into the sewer so as to be enabled to reap the benefits they ought to derive from the expenditure. It makes no distinction between property actually occupied or capable of being occupied for city purposes, and that of an agricultural nature, of which there must be some within the city limits, upon which such a burden would fall with great severity and injustice. Nor does it confine the assessment to lands upon the street in which the sewer is laid; and in the assessment before us lots on a parallel street are assessed. These lots, it is to be assumed, will be assessed again if a sewer is constructed in the street on which they front, and there is nothing in the act or in the nature of things to prevent a lot being assessed several different times in different districts, as often as a sewer is constructed which, in the opinion of the common council, is productive of benefit to the neighborhood. This might not be unjust if each assessment was laid upon an estimate of actual benefits; but when it is levied by an arbitrary standard which requires the burden to be laid upon lands far from the sewer and only slightly benefited, equally with those fronting upon it and greatly benefited, it is manifest that it must not only work injustice, but that in some cases it may amount to actual confiscation. It is not, therefore, legally possible that such an apportionment of the costs of sewers can be just, or equal, or in proportion to benefits. And when injustice must result from its adoption, we have no alternative but to reject the assessment as an unlawful exaction. It is an assessment made in entire disregard of the principle upon which special assessments can alone be sustained: The principle, namely, that "Those who enjoy the benefits shall equally bear the burden." Shaw, Ch. J., in *Wright v. Boston*, 9 Cush. 233, 241. See *Matter of Washington Avenue*, 99 Penn. St. 360; *Patterson v. Society*, 24 N. J. 400.

In what has here been said, it is not intended to decide or to intimate that a sewer tax may not under some circumstances be lawful, though apportioned by the area of the lots assessed. If under the law providing therefor the assessment were confined exclusively to lots lying contiguous to each other, and on or near the street in which the sewer was to be constructed, and all properly urban lots, or, as they are sometimes designated in lots, as distinguished from the outer lands of the town which receive only slight and indirect benefit from such improvements, and if the law also provided for private drains into the sewer as matter of right on the part of the proprietors of the lots assessed, the case would be so different from the one now before us that much of what we have said could have no application. We confine our discussion strictly to the record before us, and to the act under which this assessment is laid, not caring to enter upon any discussion of hypothetical cases which may never arise, or which, if they do arise, can better be considered when their special features are presented for consideration.

The principle of the statute being thus found to be unsound, it does not become necessary to consider details. But as new legislation will probably be procured, it seems proper to declare in this case, that parties whose property is to be taken under summary tax proceedings are entitled as of

right to be heard, at some stage in the proceedings, before the tax shall become an established charge against them or their property. It was said by Agnew, J., in *Philadelphia v. Miller*, 49 Penn. St. 440-448, that "notice, or at least the means of knowledge, is an essential element of every just proceeding which affects rights of persons or property." The principle was recognized by this court in *Butler v. Supervisor of Saginaw*, 26 Mich. 22. In England, until appeals were given from sewer assessments, it was held that the party taxed might sue the officer in trespass or replevin for a levy on his property, and in that suit might defeat the assessment if he could show that he was not benefited as the commissioners had adjudged. See *Dore v. Gray*, 2 T. R. 858; *Masters v. Scroggs*, 3 M. & S. 447; *Netherton v. Ward*, 3 B. & Ald. 21; *Stafford v. Hamston*, 2 B. & B. 691; *Loady v. Wilson*, 3 Ad. & E. 247; *Emmerson v. Saltmarsh*, 7 Ad. & El. 266; *Metropolitan Board of Works v. Vauxhall Bridge Co.* 7 El. & Bl. 964. In this country we do not allow the justice of an assessment to be inquired into, in a suit to charge the officers with a personal liability; but it follows legitimately from this, that parties taxed must have an opportunity to be heard regularly at some stage in the proceedings. Their rights are not to be concluded by proceedings which are wholly *ex parte*.

We have deferred to the last a question raised by the defendants which goes to the jurisdiction of the court. We have decided in several cases that equity has no jurisdiction to restrain the collection of a tax from goods and chattels. *Youngblood v. Sexton*, 32 Mich. 406; *Hagenbush v. Howard*, 34 Mich. 1; *Mears v. Howarth*, 1 B. 19. The bill in this case complains that the city marshal is about to proceed in the collection of the assessment from the personal property of the complainants; and had it been demurred to, the objection would have been fatal. But this case differs from *Youngblood v. Sexton*, in that the tax is one levied upon real estate, and which by the statute is made a lien. The case is consequently a proper one for a bill to remove a cloud from the title. But to such a bill the city should have been made a party, as the cloud would not be removed by merely enjoining the action of the marshal on his tax warrant. It was held in the similar case of *Palmer v. Rich*, 12 Mich. 414, that where the objection to want of parties was not seasonably made, it might be obviated by amendment made at the hearing; and, with a view to putting an end to expensive litigation, we are disposed to allow that course to be taken here. The case will be ordered remanded, with leave to the complainant to amend, by adding the city as a formal party, and with directions to enter final decree for complainants when the amendment is made. But under the circumstances, no costs will be awarded to either party.

SUPREME COURT OF THE UNITED STATES.

[OCTOBER TERM, 1876.]

LIFE INSURANCE. — PREMIUM AN ANNUITY. — EFFECT OF INTERVENTION OF WAR.

NEW YORK LIFE INS. CO. v. STATHAM.

SAME v. SEYMS.

MANHATTAN LIFE INS. CO. v. BUCK.

A policy of life insurance which stipulates for the payment of an annual premium by the assured, with a condition to be void on non-payment, is not an insurance from year to year like a common fire policy; but the premiums constitute an annuity, the whole of which is the consideration for the entire assurance for life; and the condition is a condition subsequent, making void the policy by its non-performance.

But the time of payment in such policies is material, and of the essence of the contract; and failure to pay involves an absolute forfeiture, which cannot be relieved against in equity.

If failure to pay the annual premium be caused by the intervention of war between the territories in which the insurance company and the assured respectively reside, which makes it unlawful for them to hold intercourse, the policy is nevertheless forfeited if the company insist on the condition; but in such case the assured is entitled to the equitable value of the policy arising from the premiums actually paid.

This equitable value is the difference between the cost of a new policy and the present value of the premiums yet to be paid on the forfeited policy when the forfeiture occurred, and may be recovered in an action at law or suit in equity.

The doctrine of revival of contracts, suspended during the war, is one based on considerations of equity and justice, and cannot be invoked to revive a contract which it would be unjust or inequitable to revive, — as where time is of the essence of the contract, or the parties cannot be made equal.

The average rate of mortality is the fundamental basis of life assurance, and as this is subverted by giving to the assured the option to revive their policies or not after they have been suspended by a war (since none but the sick and dying would apply), it would be unjust to compel a revival against the company.

Mr. Justice BRADLEY delivered the opinion of the court.

The first of these cases is a bill in equity filed to recover the amount of a policy of life assurance, granted by the defendants (now plaintiffs in error) in 1851, on the life of Dr. A. D. Statham, of Mississippi, from the proceeds of certain funds belonging to the defendants attached in the hands of their agent at Jackson, in that state. It appears from the statements of the bill that the annual premiums accruing on the policy were all regularly paid until the breaking out of the late civil war; but that, in consequence of that event, the premium due on the 8th of December, 1861, was not paid; the parties assured being residents of Mississippi, and the defendants a corporation of New York. Dr. Statham died in July, 1862.

The second case is an action at law brought in the same court against the same defendants to recover the amount of a policy issued in 1859 on the life of one Henry S. Seyms, the husband of the plaintiff. In this case also the premiums had been paid until the breaking out of the war, when

by reason thereof they ceased to be paid, the plaintiff and her husband being residents of Mississippi. Seyms died in May, 1862.

The third case is a similar action at law brought in the same court against the Manhattan Life Insurance Company of New York to recover the amount of a policy issued by them in 1858 on the life of C. L. Buck, of Vicksburg, Mississippi; the circumstances being substantially the same as in the other cases.

The policies in all the cases were in the usual form of such instruments, declaring that the company, in consideration of a certain specified sum to them in hand paid by the assured, and of an annual premium of the same amount to be paid on the same day and month in every year during the continuance of the policy, did assure the life of the party named, in a specified amount, for the term of his natural life. The policies contained various conditions upon the breach of which they were to be null and void; and amongst others the following: "That in case the said (assured) shall not pay the said premium on or before the several days hereinbefore mentioned for the payment thereof, then and in every such case, the said company shall not be liable to the payment of the sum insured, or in any part thereof, and this policy shall cease and determine." The Manhattan policy contained the additional provision, that in every case where the policy should cease or become null and void, all previous payments made thereon should be forfeited to the company.

The non-payment of the premiums in arrear was set up in bar of the actions, and the plaintiffs respectively relied on the existence of the war as an excuse, offering to deduct the premiums in arrear from the amounts of the policies.

We agree with the court below, that the contract is not an assurance for a single year, with a privilege of renewal from year to year by paying the annual premium, but that it is an entire contract of assurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums. Such is the form of the contract, and such is its character. It has been contended that the payment of each premium is the consideration for insurance during the next following year,—as in fire policies. But the position is untenable. It often happens that the assured pays the entire premium in advance, or in five, ten, or twenty annual instalments. Such instalments are clearly not intended as the consideration for the respective years in which they are paid; for, after they are all paid, the policy stands good for the balance of the life insured, without any further payment. Each instalment is, in fact, part consideration of the entire insurance for life. It is the same thing, where the annual premiums are spread over the whole life. The value of assurance for one year of a man's life when he is young, strong, and healthy, is manifestly not the same as when he is old and decrepit. There is no proper relation between the annual premium and the risk of assurance for the year in which it is paid. This idea of assurance from year to year is the suggestion of ingenious counsel. The annual premiums are an annuity, the present value of which is calculated to correspond with the present value of the amount assured, a reasonable percentage being added to the premiums to cover expenses and contingencies. The whole premiums are balanced against the whole insurance.

But whilst this is true, it must be conceded that promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payments. They not only calculate on the receipt of the premiums when due, but on compounding interest upon them. It is on this basis that they are enabled to offer assurance at the favorable rates they do. Forfeiture for non-payment is a necessary means of protecting themselves from embarrassment. Unless it were enforceable, the business would be thrown into utter confusion. It is like the forfeiture of shares in mining enterprises, and all other hazardous undertakings. There must be power to cut off unprofitable members or the success of the whole scheme is endangered. The insured parties are associates in a great scheme. This associated relation exists whether the company be a mutual one or not. Each is interested in the engagements of all; for out of the coexistence of many risks arises the law of average which underlies the whole business. An essential feature of this scheme is the mathematical calculations referred to, on which the premiums and amounts assured are based. And these calculations, again, are based on the assumption of average mortality and of prompt payments and compound interest thereon. Delinquency cannot be tolerated nor redeemed, except at the option of the company. This has always been the understanding and the practice in this department of business. Some companies, it is true, accord a grace of thirty days, or other fixed period, within which the premium in arrear may be paid on certain conditions of continued good health, &c. But this is a matter of stipulation, or of discretion on the part of the particular company. When no stipulation exists it is the general understanding that time is material, and that the forfeiture is absolute if the premium be not paid. The extraordinary and even desperate efforts sometimes made, when an insured person is *in extremis* to meet a premium coming due, demonstrates the common view of this matter.

The case therefore is one in which time is material and of the essence of the contract. Non-payment at the day involves absolute forfeiture, if such be the terms of the contract, as is the case here. Courts cannot with safety vary the stipulation of the parties by introducing equities for the relief of the insured against their own negligence.

But the court below bases its decision on the assumption, that when performance of the condition becomes illegal in consequence of the prevalence of public war, it is excused, and forfeiture does not ensue. It supposes the contract to have been suspended during the war, and to have revived with all its force when the war ended. Such a suspension and revival do take place in the case of ordinary debts. But have they ever been known to take place in the case of executory contracts in which time is material? If a Texas merchant had contracted to furnish some northern explorer a thousand cans of preserved meat by a certain day, so as to be ready for his departure for the North Pole, and was prevented from furnishing it by the civil war, would the contract still be good at the close of the war five years afterwards and after the return of the expedition? If the proprietor of a Tennessee quarry had agreed in 1860 to furnish during the two following years ten thousand cubic feet of marble for the construction of a building in Cincinnati, could he have claimed to

perform the contract in 1865, on the ground that the war prevented an earlier performance?

The truth is, that the doctrine of the revival of contracts, suspended during the war, is one based on considerations of equity and justice, and cannot be invoked to revive a contract which it would be unjust or inequitable to revive.

In the case of life insurance, besides the materiality of time in the performance of the contract, another strong reason exists why the policy should not be revived. The parties do not stand on equal ground in reference to such a revival. It would operate most unjustly against the company. The business of insurance is founded on the law of averages; that of life insurance eminently so. The average rate of mortality is the basis on which it rests. By spreading their risks over a large number of cases, the companies calculate on this average with reasonable certainty and safety. Anything that interferes with it deranges the security of the business. If every policy lapsed by reason of the war should be revived, and all the back premiums should be paid, the companies would have the benefit of this average amount of risk. But the good risks are never heard from; only the bad are sought to be revived — where the person insured is either dead or dying. Those in health can get new policies cheaper than to pay arrearages on the old. To enforce a revival of the bad cases, whilst the company necessarily loses the cases which are desirable, would be manifestly unjust. An insured person, as before stated, does not stand isolated and alone. His case is connected with and correlated to the cases of all others insured by the same company. The nature of the business as a whole must be looked at to understand the general equities of the parties.

We are of opinion, therefore, that an action cannot be maintained for the amount assured on a policy of life insurance forfeited (like those in question) by non-payment of the premium, even though the payment was prevented by the existence of the war.

The question then arises, must the insured lose all the money which has been paid for premiums on their respective policies? If they must, they will sustain an equal injustice to that which the companies would sustain by reviving the policies. At the very first blush it seems manifest that justice requires that they should have some compensation or return for the money already paid, otherwise the companies would be the gainers from their loss; and that from a cause for which neither party is to blame. The case may be illustrated thus. Suppose an inhabitant of Georgia had bargained for a house situated in a northern city, to be paid for by instalments, and no title to be made until all the instalments were paid; with a condition that, on the failure to pay any of the instalments when due, the contract should be at an end and the previous payments forfeited; and suppose that this condition was declared by the parties to be absolute and the time of payment material. Now if some of the instalments were paid before the war, and others accruing during the war were not paid, the contract, as an executory one, was at an end. If the necessities of the vendor obliged him to avail himself of the condition and to re-sell the property to another party, would it be just for him to retain the money he had received? Perhaps it might be just if the fail-

ure to pay had been voluntary, or could, by possibility, have been avoided. But it was caused by an event beyond the control of either party, — an event which made it unlawful to pay. In such case, whilst it would be unjust, after the war, to enforce the contract as an executory one against the vendor, contrary to his will; it would be equally unjust in him, treating it as ended, to insist upon the forfeiture of the money already paid on it. An equitable right to some compensation or return for previous payments would clearly result from the circumstances of the case. The money paid by the purchaser, subject to the value of any possession which he may have enjoyed, should *ex æquo et bono* be returned to him. This would clearly be demanded by justice and right.

And so, in the present case, whilst the insurance company has a right to insist on the materiality of time in the condition of payment of premiums, and to hold the contract ended by reason of non-payment, they cannot with any fairness insist upon the condition as it regards the forfeiture of the premiums already paid. That would be clearly unjust and inequitable. The insured has an equitable right to have this amount restored to him, subject to a deduction for the value of the assurance enjoyed by him whilst the policy was in existence. In other words, he is fairly entitled to have the equitable value of his policy.

As before suggested, the annual premiums are not the consideration of assurance for the year in which they are severally paid, for they are equal in amount; whereas, the risk in the early years of life is much less than in the later. It is common knowledge that the annual premiums are increased with the age of the person applying for insurance. According to approved tables, a person becoming insured at twenty-five is charged about twenty dollars annual premium on a policy of \$1,000; whilst a person at forty-five is charged about thirty-eight dollars. It is evident, therefore, that when the younger person arrives at forty-five his policy has become (by reason of his previous payments) of considerable value. Instead of having to pay, for the balance of his life, thirty-eight dollars per annum, as he would if he took out a new policy on which nothing had been paid, he has only to pay twenty dollars. The difference (eighteen dollars per annum during his life) is called the equitable value of his policy. The present value of the assurance on his life exceeds by this amount what he has yet to pay. Indeed, the company, if well managed, has laid aside and invested a reserve fund equal to this equitable value, to be appropriated to the payment of his policy when it falls due. This reserve fund has grown out of the premiums already paid. It belongs, in one sense, to the insured who has paid them, somewhat as a deposit in a savings bank is said to belong to the person who made the deposit. Indeed, some life insurance companies have a standing regulation by which they agree to pay to any person insured the equitable value of his policy whenever he wishes it. In other words, it is due on demand. But whether thus demandable or not, the policy has a real value corresponding to it, — a value on which the holder often realizes money by borrowing. The careful capitalist does not fail to see that the present value of the amount assured exceeds the present value of the annuity or annual premium yet to be paid by the assured party. The present value of the amount assured is exactly represented by the annuity which would have

to be paid on a new policy; or, thirty-eight dollars per annum in the case supposed, where the party is forty-five years old; whilst the present value of the premiums yet to be paid on a policy taken by the same person at twenty-five is but little more than half that amount. To forfeit this excess, which fairly belongs to the assured, and is fairly due from the company, and which the latter actually has in its coffers, and to do this for a cause beyond individual control, would be rank injustice. It would be taking away from the assured that which had already become substantially his property. It would be contrary to the maxim, that no one should be made rich by making another poor.

We are of opinion, therefore, first, that as the companies elected to insist upon the condition in these cases, the policies in question must be regarded as extinguished by the non-payment of the premiums, though caused by the existence of the war, and that an action will not lie for the amount insured thereon.

Secondly, that such failure being caused by a public war, without the fault of the assured, they are entitled *ex æquo et bono* to recover the equitable value of the policies with interest from the close of the war.

It results from these conclusions that the several judgments and decrees in the cases before us, being in favor of the plaintiffs for the whole sum assured, must be reversed, and the records remanded for further proceedings. We perceive that the declarations in the actions at law contain no common or other counts applicable to the kind of relief which, according to our decision, the plaintiffs are entitled to demand; but as the question is one of first impression, in which the parties were necessarily somewhat in the dark with regard to their precise rights and remedies, we think it fair and just, that they should be allowed to amend their pleadings. In the equitable suit perhaps the prayer for alternative relief might be sufficient to sustain a proper decree; but nevertheless the complainants should be allowed to amend their bill if they shall be so advised.

In estimating the equitable value of a policy no deduction should be made from the precise amount which the calculations give, as is sometimes done where policies are voluntarily surrendered, for the purpose of discouraging such surrenders; and the value should be taken as of the day when the first default occurred in the payment of the premium by which the policy became forfeited. In each case the rates of mortality and interest used in the tables of the company will form the basis of the calculation.

The decree in the equity suit and the judgment in the actions at law are reversed, and the causes respectively remanded to be proceeded in according to law and the directions of this opinion.

WAITE, Ch. J. I agree with the majority of the court in the opinion that the decree and judgments in these cases should be reversed, and that the failure to pay the annual premiums as they matured put an end to the policies, notwithstanding the default was occasioned by the war, but I do not think that a default, even under such circumstances, raises an implied promise by the company to pay the assured what his policy was equitably worth at the time. I therefore dissent from that part of the judgment just announced which remands the causes for trial upon such a promise.

STRONG, J. While I concur in a reversal of these judgments and the decree, I dissent entirely from the opinion filed by a majority of the court. I cannot construe the policies as the majority have construed them. A policy of life insurance is a peculiar contract. Its obligations are unilateral. It contains no undertaking of the assured to pay premiums. It merely gives him an option to pay or not, and thus to continue the obligation of the insurers or terminate it at his pleasure. It follows that the consideration for the assumption of the insurers can in no sense be considered an annuity consisting of the annual premiums. In my opinion the true meaning of the contract is that the applicant for insurance, by paying the first premium, obtains an insurance for one year, together with a right to have the insurance continued from year to year during his life, upon payment of the same annual premium, if paid in advance. Whether he will avail himself of the refusal of the insurers, or not, is optional with him. The payment *ad diem* of the second or any subsequent premium is, therefore, a condition precedent to continued liability of the insurers. The assured may perform it or not at his option. In such a case the doctrine that accident, inevitable necessity, or the act of God may excuse performance has no existence. It is for this reason that I think the policies upon which these suits were brought were not in force after the assured ceased to pay premiums. And so, though for other reasons, the majority of the court holds, but they hold at the same time that the assured in each case is entitled to recover the surrender, or what they call the equitable value, of the policy. This is incomprehensible to me. I think it has never before been decided that the surrender value of a policy can be recovered by an assured unless there has been an agreement between the parties for a surrender, and certainly it has not before been decided that a supervening state of war makes a contract between private parties, or raises an implication of one.

Mr. Justice CLIFFORD, dissenting. Where the parties to an executory money contract live in different countries and the governments of those countries become involved in public war with each other, the contract between such parties is suspended during the existence of the war and revives when peace ensues; and that rule, in my judgment, is as applicable to the contract of life insurance as to any other executory contract. Consequently I am obliged to dissent from the opinion and judgment of the court in these cases.

Mr. Justice HUNT concurs in this dissent.

COURT OF APPEALS OF MARYLAND.

(To appear in 43 Md.)

NEGOTIABILITY OF A NOTE ISSUED BY A BUILDING ASSOCIATION. —
LIABILITY OF INDORSERS OF SUCH NOTE.

JACKSON v. MYERS.

A building association was organized in August, 1871, under the act of 1868, ch. 471, the general incorporation law of the state, and by the 9th and 11th articles of its association, it was provided that its board might issue promissory notes on mortgages only, and that such notes should always be drawn to the order of the mortgagor, who should in all cases indorse the note thus drawn. The president, secretary, treasurer, and three directors were authorized to sign all promissory notes issued by the association. Under the authority of these articles the association issued its note to the appellees instead of money, for which a mortgage was given. The note was strictly in form a promissory note, payable to the order of the appellees. It was drawn at sixty days' time, and payable at a certain named bank; and was signed by the officers designated in the articles of association to execute promissory notes. In one corner of the face of the note there was the type or emblem of what was alleged to be the seal of the corporation; this alleged seal consisted simply of an emblem or symbol printed by the printer at the time when the printed blank note was struck. The note was indorsed by the payees, and by them negotiated, and at maturity was duly presented for payment, and was dishonored and protested, and notice given by the notary to the said indorsers, and payment duly demanded of them. Suit was brought on the note by the indorsees against the indorsers, who contended that they were not liable by reason of their indorsement, because the instrument sued on was a single bill. *Held*:—

1. That the note sued on was a negotiable promissory note, and by the indorsement thereof in the ordinary way, the indorsers became liable.
2. That the nature of the transaction itself, the objects and purposes to be subserved by the issue of the note, as well as its form, indicated that the parties must have understood that the note was negotiable, and that it would be so accepted and dealt with by the commercial community.
3. That the symbol or printed representation of the seal, if it be conceded to be a sufficient seal, was not printed on the note to restrain its negotiability, or to change it into a specialty, but rather as a mark of genuineness.
4. That the note in no manner depended upon the seal for its validity, but derived its entire authenticity from the signatures of the officers authorized to execute it.

APPEAL from the superior court of Baltimore city.

This was an action of assumpsit brought by the appellants against the appellees as indorsers of the following promissory note:—

\$900

BALTIMORE, June 21, 1873.

Sixty days after date, Old Town Permanent Building Association promises to pay to the order of *Myers Brothers*, nine hundred $\frac{00}{100}$ dollars, with interest, for value received, payable at the German Savings Bank.

Thomas H. Boyer, *Pres't*.

Robt. L. Dickey, *Sec'y*.

A. S. Miles, *Treas.*

G. S. Windsor, Martin Zirpe, John A. Stokes, Directors. (Seal of Old Town Permanent Building Association.) On the margin of the note was the memorandum: "This note is issued on mortgage of *Myers Brothers*, left for record June 18, 1872."

The words of the note *italicised* were written with a pen, and the words or portions not *italicised* were printed; and the circle around the words "Seal of Old Town Permanent Building Association," as well as the words themselves, were printed; and it was proved that the said words and circle, and other printed portions, constituted a printed form used by the officers of the corporation in writing the promissory notes issued under articles nine and eleven of the constitution, and that many such notes had been issued and negotiated. The genuineness of the signatures to the note, as also of the indorsement of the defendants thereon, was proved by the plaintiffs.

It was admitted that the Old Town Permanent Building Association was incorporated on the 31st of August, 1872, under the act of 1868, ch. 471, the general incorporation law of the state. Article 9 of the constitution of the association was as follows:—

"Sec. 1. The board may issue promissory notes on mortgage only, and must always be drawn to order of mortgagor. When a transfer of mortgage is executed, all notes must be lifted or new ones drawn to order of the new mortgagor, and in case of renewal of notes the new ones must also be drawn to order of the mortgagor, and mortgagor must in all cases indorse the notes when to his or her order.

"Sec. 2. The board may accept or negotiate promissory notes of any good, responsible building association, or other corporation in good standing and credit, in payment for stock in this association, and on terms to be arranged by the board."

Article 11 was as follows:—

"The president, vice-president, secretary, treasurer, comptroller, and directors shall constitute the board for the transaction of such business as shall be intrusted to them by these articles, a majority of whom shall constitute a quorum. They may hold special meetings whenever called by the president. They shall have the general supervision of the affairs of the association, and the duties of its officers. The president, secretary, treasurer, and three directors shall sign all promissory notes issued and authorized by the association. They shall incur no expense, except providing for the necessary accommodations of their own and regular meetings, when authorized to do so by a vote of this association. They shall judge of the sufficiency of all mortgages and other securities offered to this association."

The plaintiffs proved by one Rennolds that in 1872 the defendants told the witness they had a good building association note—naming the Old Town Permanent Building Association as the maker—indorsed by themselves, which they wanted to negotiate; he thereupon informed Miss Priscilla Lynch (since married, and one of the appellants), who upon his advice authorized him to take the offered note; with her money he paid the defendants nine hundred dollars, less an agreed discount, and received the note from them and gave it to the said Priscilla. That the note so negotiated was dated June 18, 1872, and was payable twelve months after date to the order of the defendants; was indorsed by them in blank, and was otherwise like the note sued on. A mortgage executed to the Old Town Permanent Building Association by the appellees, dated June 18, 1872, and duly recorded, was offered in evidence, and admitted to be

the same mortgage referred to in the margin of both of said notes. When the twelve months' note was about maturing, the appellees applied to Rennolds, as he testified, to have it renewed for sixty days; he saw Miss Lynch, and she consented to take a renewal of the note with indorsement of the appellees; that one of the appellees brought him the note sued on, and the original or twelve months' note was surrendered.

The note sued on was presented at maturity for payment, was dishonored and protested, and notice given by the notary to the appellees as indorsers, and payment duly demanded of them. Rennolds further testified that before the note matured he told the appellees that he intended, on behalf of Miss Lynch, to have it protested if it were not paid, and to hold them responsible; and that was why he had insisted upon their indorsing it; they never denied their obligation to pay the note; but after it was due, admitted they owed the money, promised to pay it, and said they were making negotiations to raise money for the purpose, and requested that no suit should be brought upon the note; and it was upon their request that suit was not sooner brought.

Thomas H. Boyer, on the part of the defendants, testified that in 1872, and subsequently, he was President of the Old Town Permanent Building Association; that the note dated June 18, 1872, was issued to the defendants under article 9 of the constitution, on the mortgage offered in evidence; that no money was paid by the association to the defendants, but the note was accepted by them as money.

The witness further testified, subject to exception, pointing to the printed impression on the note sued on, "that is the seal of the association — that is our seal; we had no other seal; we recognized and adopted that seal when the note was filled up; that particular seal in that particular case was recognized as ours; all the officers who signed that note recognized that as our seal."

On cross-examination, the witness testified: "There was no action of the board of directors, that I know of, recognizing the seal; the only recognition of it was the issue of the notes with it upon them."

Prayers were offered on both sides, but their insertion is deemed unnecessary. The defence set up was that the note in question was to be regarded as a sealed instrument, and that therefore the defendants were not legally responsible on their mere indorsement; and this defence was sustained by the rulings of the court. The verdict and judgment were for the defendants, and the plaintiffs appealed.

The cause was argued before Bartol, C. J., Stewart, Miller, Alvey, and Robinson, JJ.

William A. Fisher & Arthur W. Machen, for the appellants. The writing in question, upon the evidence, was a promissory note, and not a specialty. The instruments the board of directors of the association were authorized to issue were called *promissory notes*; and the definition of a promissory note is a promise in writing payable to order or bearer, and "signed but not sealed." Byles, ch. 2. Farther, it is expressly said that they are to be drawn *to order*; which cannot effectively be done unless the instrument is negotiable. It is required that they shall be drawn to the order of the party to whom they are issued, and that he must *indorse* them; and "the effect of *indorsing* is a conditional contract

on the part of the indorser, to pay the immediate or any succeeding indorsee or bearer, in case of the acceptor or maker's default." Byles, c. 1, p. 2. If we look at the course of dealing, it is even more apparent that nothing capable of affecting the negotiability of the instrument could have been designed. In lieu of money, which ordinarily the borrower would be entitled to receive, the association gave its note. That the note should be seen to have a substantial guaranty, it bore in the margin a statement that it was issued on a mortgage executed by the payee. The mortgagor was *required* to indorse it. Issued in place of money, it was expected that it would be discounted, so as to enable the payee and indorser to obtain that use of money which was the only object he could have had in creating an incumbrance upon his property. Such, accordingly, was the consequence. The notes were negotiated like other commercial paper, upon the combined credit of the two parties who made themselves responsible upon it by their signatures — the building association as maker, the borrowers as indorsers. In addition, the note had the strength derived from the fact that real property, of supposed equivalent value, was pledged for the payment of the debt represented by it — not directly, as in the common case of a mortgage and mortgage note, but circuitously, by being made to the maker, as an indemnity against the consequences of the liability assumed in giving such a note. The effect of the whole was to make the indorser the party primarily liable, while the association stood as an accommodation maker, secured by the mortgage.

But is there any principle or "stubborn rule of law," which prevents this instrument from having the effect it was designed to have, and which the conduct of the parties shows that they all originally contemplated? On the contrary, it is a well recognized principle, that if a seal is added to an instrument which does not require it, and the presence of the seal operates to prevent the writing from having the effect it was intended to have, such seal may be treated as surplusage and disregarded. *Hunter v. Parker*, 7 M. & W. 322; *Wood v. Auburn & Rochester R. R.* 4 Seld. 167; *Worrall v. Munn*, 1 Seld. 229; *Robinson v. Crowder*, 4 McCord, 519; *Irwin v. Brown*, 2 Cranch C. C. 314; *Brattan v. Burton & Mills*, 1 Chitty's R. 707; *Eureka Co. v. Bailey Co.* 11 Wall. 491; *Arnold v. Rock River Valley Union R. R. Co.* 5 Duer, 208, 215.

There is the more reason for rejecting the seal in this case, because if the board of directors assumed to attach the corporate seal to the note they acted without authority. They had authority to *sign* the notes, but none to seal them. And not only was it beyond *their* authority, but the association itself had no right to put a seal to an instrument of that character, issued under the 9th article of its constitution: to do it was *ultra vires*.

A corporate seal does not prove itself. And to entitle the printed circle in question to be received as the corporate seal of this association, it was necessary to produce a corporate act making it the seal. Nothing less than a vote of the board of directors could amount to such an act, even if it did not require, as it seems it did under the articles, a resolution of the association itself. 2 Phill. Ev. 385, top (edition of 1867); *Jackson v. Pratt*, 10 Johns. 386; *Damon v. Granby*, 2 Pick. 353.

Even where the seal is proved to be the seal of the corporation, its

mere presence upon a document does not make the latter the deed of the corporation; it is necessary to show further that the seal was put there by some one duly authorized to do so. *Koehler v. Black River Falls Iron Co.* 2 Black, 716; *Damon v. Granby*, 2 Pick. 352. No evidence was offered of any resolution or other act of the board of directors, authorizing the issue of the note in question, or other similar notes, as sealed instruments, or adopting said seal or imprint as the seal of the said corporation; there was no evidence at all before the court, upon which it could hold the note to have been sealed by the association.

The presumption, which in this state, since the decision of *Trasher v. Everhart*, 3 G. & J. 246, has been understood to exist (somewhat in conflict perhaps with the common law, as now recognized in England, as well as elsewhere), that a scroll appearing upon an instrument signed by a natural person, even without words importing an intent to affix a seal, is the seal of such person, never has been held to apply to the case of a supposed corporate seal, and from the nature of the case cannot so apply. Hence, although the rule in Massachusetts, as to the deeds of natural persons, may be conceded to be different from that which has been adopted here, the case of *Bates v. Boston & N. Y. Cent. R. R. Co.* 10 Allen, 251, — a case of a printed fac-simile of a seal sought to be treated as a corporate seal, — is of undiminished authority. *Kinzie v. Chicago*, 3 Ill. (2 Scam.) 187.

The printed circle here is not necessarily the seal of the association, any more than the oblong figure, with the word *stamp* in it, frequently printed upon check blanks, is the actual stamp whose place it indicates. Its presence no more makes the writing afterwards written upon it a sealed instrument, than the red picture of the treasury seal on a national bank note, or on a legal tender note, makes either of those documents a contract under seal.

John Henry Keene, Jr., for the appellees.

Orville Horwitz, being interested, as representing several defendants to cases in the courts of Baltimore city, in one of the questions involved in this case, was permitted to present his views thereon. He argued that the effect of such indorsement on a single bill operates as a mere assignment of the equitable interest in the said bill of the payee or holder, and in the absence of any special agreement to the contrary, and in the absence of fraud, it creates no liability, actual or contingent, against the assignor.

The instrument in question being under seal is *not a bill of exchange*. To quote the language of Ch. J. Gilpin, in *Conine v. J. & B. R. R. Co.* 3 Houston, 299, "from that day — the time of James the First — to this, no case can be found in the books of a bill of exchange with a seal affixed to it."

The distinctions between sealed instruments and bills of exchange are too well marked to need repetition or authority. None, however, are better established than the negotiability of bills of exchange and the non-negotiability of specialties; the transfer by *indorsement* of bills of exchange, and the assignment of *choses in action*. Story on Bills, ch. 4, § 61; *Glyn v. Baker*, 13 East, 515, 516; *Warren v. Lynch*, 5 Johns. 239

Clark v. Farmers' Man. Co. 15 Wend. 256; *Foster v. Floyd*, 4 McCord, 159; *Helper v. Alden*, 8 Min. 332.

What, then, is the effect of the indorsement of the name of the obligee of a specialty in blank?

The indorsement in blank authorizes the holder to write over the name of the indorser in blank only the contract implied by law, and nothing more. *Tenney v. Prince*, 4 Pick. 385; *Nevins v. De Grand*, 15 Miss. 436.

The contract of indorsement on commercial paper becomes a commercial contract, operating as a contingent guaranty *where the paper is negotiable*; to any other *chose in action* it becomes an equitable assignment of the beneficial interest, without recourse to the assignor; and this is, therefore, the only contract which can be legally written over the blank indorsement. *Kirkpatrick v. McCullough*, 3 Humph. 173; *Parks v. Duke*, 2 McCord, 380; *Folwell v. Beaver*, 13 S. & R. 314-316; *Frevall v. Fitch*, 5 Wharton, 325; *Patterson v. Poindexter*, 6 W. & S. 230, 235; *Cummings v. Lynn*, 1 Dall. 444; *Parker v. Kennedy*, 1 Bay, 398; *Ex'rs of Garretsie v. Van Ness*, Pennington's Rep. (N. J.) 13-24.

To such single bills there are no days of grace, and demand and notice (if any demand and notice can be effective in creating responsibility) should be made and given on the day of actual maturity. *Skidmore v. Little*, 4 Texas, 301; *McMullen v. Abbott*, 1 Oregon, 258.

Not only so, but the diligence required of the holder of a note, even of a promissory note which is not negotiable, is to demand the amount, as soon as it falls due, of the maker, and, in the event of failure to pay, to sue him immediately. *Swift's Ev.* 347.

The Code in the 8th section of the 9th article would seem to point out the only cases in which the assignor of a specialty can be held responsible to the assignee.

ALVEY, J., delivered the opinion of the court.

Whether the note sued on is to be treated as a negotiable promissory note, or as a single bill, under the seal of the corporation, the maker, is the main question in this cause, and the one upon which all the other questions depend. According to the rulings of the court below, the instrument was held to be a single bill, and consequently the appellees were not liable on a mere indorsement of the note, as they would have been if the note had been a negotiable promissory note, instead of what it was held to be.

The appellees being sued, and sought to be held liable, by reason of their indorsement of the note, if the instrument be in reality a specialty, though in the form of a promissory note, no obligation or liability arose from the mere indorsement of it, either by the statute or the custom of merchants. As a sealed instrument, it could be assigned, as required by the statute, to enable the assignee to sue in his own name; but then no liability would arise by the assignment, upon which the assignor could be held responsible, unless the assignment be made in the manner and form prescribed by the Code, art. 9, secs. 8 and 9, or unless the assignment embody a separate and distinct contract or undertaking, as in the case of *Gist v. Drakeley*, 2 Gill, 330. If the indorsement of a sealed instrument be in blank, accompanied by delivery, the party to whom the instrument is delivered may fill up the blank, with a full assignment to himself, and

thus become absolute owner, with right to maintain suit in his own name, within the meaning of the statute; and though the assignment may not be extended until the time of trial, it is regarded, for the purposes of the suit, as having been made in its extended form when the instrument was indorsed; as was the case in *Chesley v. Taylor*, 3 Gill, 251.

Here, the note was indorsed in blank by the appellees, who were the payees in the note, and after such indorsement, but before or at the time of the trial, the appellants wrote over the blank indorsement the words, "We hereby indorse and assign the within, and direct payment thereof to be made to Priscilla Lynch," one of the appellants. This was good as an assignment, upon the assumption that the note was a single bill; and it was all-sufficient as an indorsement in full, treating the instrument as a negotiable promissory note. As an indorsement of negotiable paper it created a liability on the part of the appellees, but as an assignment of a non-negotiable *chose in action* it created none, and only transferred the right of the assignors, with the power to sue and maintain an action on the note in the name of the assignee. It was in this latter aspect that the court below instructed the jury against the right of the appellants to recover on the indorsement against the appellees.

But is the note a specialty or single bill, as distinguished from a promissory note, made negotiable by the statute of 3 & 4 Anne, ch. 9? The Building Association that made the note was organized under the present general incorporation law of the state, and by the 9th and 11th articles of its association, it is provided that its board may issue promissory notes on mortgages only, and that such notes shall always be drawn to the order of the mortgagor, who shall, in all cases, indorse the notes thus drawn. The president, secretary, treasurer, and three directors, are authorized to *sign* all promissory notes issued by the association. The note in question was issued on the mortgage of the payees of the note, and is conceded to have been under the authority of the articles just referred to. The note is strictly in form a promissory note, payable to the order of the payees named, who are the present appellees. It was drawn at sixty days' time, and payable at a certain named bank. It has been treated as ordinary negotiable paper, and hence it was protested for non-payment. It was signed by the officers designated in the articles of association to execute promissory notes, and the only thing that is supposed to deprive it of the qualities of such paper is the appearance, in one corner of the face of the note, of the type or emblem of what is said to be the seal of the corporation. There is no statement or declaration in any part of the note that it was, or was designed to be, executed under the corporate seal. What is alleged to be the seal consists simply of an emblem or symbol printed by the printer at the time when the printed blank note was struck. Whether this printed symbol is a sufficient seal, or can be made sufficient by adoption, is a question that we need not now decide; for, even conceding it to be a sufficient representation of the corporate seal, still, we are of opinion that the note in question is a negotiable promissory note, by the indorsement of which in the ordinary manner liability attached to the indorser.

In this case, as we have seen, the officers of the corporation signing the note were authorized and directed to issue promissory notes in a negotia-

ble form, and it should be presumed that they intended to conform to their authority rather than violate it. But, apart from this consideration, the very nature of the transaction itself, the objects and purposes to be subserved by the issue of the note, as well as its form, plainly indicate that the parties must have understood that the note was negotiable, and that it would be so accepted and dealt with by the commercial community. The Building Association issued the note to the appellees, instead of money for which the mortgage was given. It was certainly contemplated, that the appellees should negotiate the note, in order to obtain the money that the association had contracted to loan, and that was rendered impossible, from the form of the note, except by indorsement. No bank or banker would likely discount the note, if not negotiable, upon mere assignment, subject to the equities existing between the original parties. It sufficiently appears that the present note, and others like it, have been dealt with by the banks, and the commercial community generally, as ordinarily negotiable paper; and in their understanding of the nature and qualities of these instruments, we think they have not been mistaken. The symbol or printed representation of the seal, if it be conceded to be a sufficient seal, was not printed on the note to restrain its negotiability, or to change it into a specialty, but rather as a mark of genuineness. The note in no manner depends upon the seal for its validity, but derives its entire authenticity from the signatures of the officers authorized to execute it. This view of the subject is fully sustained by the recent cases of *Dinsmore v. Duncan*, 57 N. Y. 578, and *Vermilye v. Adams Express Co.* 21 Wall. 138, involving the consideration of the nature and qualities of the United States treasury notes, issued under the seal of the treasury, as authorized by the Act of Congress of March 3, 1865.

The authorities mainly relied on by the appellees in support of the position that because there is a seal, or the representation of a seal, on the note, therefore the note must be a specialty, are the cases of *Trasher v. Everhart*, 3 Gill & John. 234; *Stabler v. Cowman*, 7 Gill & John. 284, and *Gist v. Drakeley*, 2 Gill, 330. The first two of these cases presented no question as to what constituted, or as to the effect of printing a representation of a corporate seal on an instrument executed by a corporation; but were cases where the instruments involved were executed by individuals, using the scrawl at the end of their names as seals. The law settled by those cases we in no manner design to disturb. Nor do we propose to qualify or disturb any of the principles decided in the case of *Gist v. Drakeley*. That case, however, is quite distinguishable from the present. There, the two notes executed by the corporation, though in the ordinary form of promissory notes, bore upon their face such evidence of design as to leave no doubt of their real character. They bore the regular impress of the seal, attested by the signature of the president; the notes concluded with the words, "Witness the seal of the company, attested by the signature of the president." The seal was the only real evidence of execution, the signature of the president being added to attest the affixing of the seal to the instruments. Not so in the execution of the note before us.

With these views, differing from those entertained by the court below as to the nature and character of the note in suit, and without referring

specifically to the several prayers offered on each side, as they will be of little or no importance in the re-trial of the cause, we shall reverse the judgment appealed from, and award a new trial.

Judgment reversed, and new trial awarded.

CIRCUIT COURT OF THE UNITED STATES.—SOUTHERN DISTRICT OF MISSISSIPPI.

BANKRUPTCY. — CHAMPERTY. — ATTORNEY AND CLIENT. — CONTINGENT FEE, ETC.

MAYBIN v. RAYMOND, assignee.

RAYMOND, assignee v. HARRIS *et al.*

1. After a bankrupt had been discharged, a large fund was recovered in a suit against the United States in the court of claims, by counsel employed by him before his bankruptcy, on a contract that they should carry on the suit to recover the same at their own costs and charges, and have and retain for their compensation one half the amount recovered. The fund so recovered being in possession of the bankrupt court, the bankrupt filed his petition, praying that the share of his said counsel in the fund might be paid to them, that a sufficient sum might be set apart to pay all debts proven against his estate, and also the costs and commissions of the bankruptcy, and that the residue might be paid over to himself; *held*, that such a petition was one in the ordinary course of a bankrupt proceeding, and was not a bill in equity, nor did the relief prayed for require the filing of a bill in equity; nor was a decree of the bankrupt court, directing the payment to said counsel of their share in the recovery, the allowance of a claim against the bankrupt estate. The proper method, therefore, to reverse a decree made on such a petition was not by appeal, but by petition, addressed to the supervisory jurisdiction of the circuit court.
2. The common law on the subject of champerty and maintenance has not been generally adopted in this country, the reasons on which the law was founded not existing here. Therefore, a contract, such as that mentioned in the first head-note, made by a party with his counsel is not an unlawful, but is a valid and binding contract.
3. Upon the facts stated in the first head-note, the attorneys who recovered the judgment were entitled to one half the amount recovered, notwithstanding the subsequent bankruptcy of the party with whom they contracted, and notwithstanding the recovery was subsequent to the bankruptcy.
4. A paper writing purporting to be the discharge of a bankrupt, without date, signed by the register without application therefor by the assignee, and which by inadvertence has found its way among the records of the court, does not put an end to the powers of the assignee, or terminate the bankruptcy proceedings; it is no part of the record, and may be ordered by the court to be stricken from the files.
5. The discharge of a bankrupt is not such an adjudication of the fact that he has surrendered all his property for the benefit of his creditors as to bar the right of his assignee to recover property discovered after the discharge, and which the bankrupt had failed to place upon his schedule.
6. Where an assignee in bankruptcy more than two years after his appointment is substituted for the bankrupt as plaintiff in a suit pending in the bankrupt's name, and recovers a sum of money in the suit, the bankrupt cannot claim from the assignee the money so recovered, on the ground that the cause of action in favor of the latter was barred at the time he was substituted as plaintiff in the suit.
7. Where authority was obtained from the bankrupt court upon the application of the assignee to make the contract mentioned in the first head-note for the prosecution of a claim due the bankrupt estate, the court being kept in ignorance of facts which, if

known to it, would surely have induced it to withhold such authority, the contract is not binding in the court or on the bankrupt estate, especially when the attorneys with whom the contract was made knew that the assignee had not communicated such facts to the court.

ON the 3d of June, 1876, the district court of the United States for the Southern District of Mississippi, sitting in bankruptcy, made a decree, to revise certain portions of which these petitions were filed. This decree was made under the following circumstances : —

Raymond, the assignee of Maybin, had recovered in the court of claims a judgment against the United States for \$71,020, which sum had been drawn from the treasury of the United States, and at the date of the decree of the district court was in the registry of the court subject to distribution by its order. In anticipation of this state of fact, Maybin, the bankrupt, had filed on January 26, 1876, a petition in the district court in which he set forth that Messrs. Harris & Harris, a firm of solicitors in Vicksburg, were entitled to one half the amount so recovered from the United States, by reason of a contract entered into in 1866 with them by him before his bankruptcy, by which he agreed that in consideration of their prosecuting said claim and paying all expenses incident to such prosecution, they were to have and retain one half the amount they might recover from the United States. That Harris & Harris had associated with themselves in the contract Messrs. Bartley & Casey, solicitors in Washington city, and that by the united services of all his said counsel on May 25, 1875, a judgment was recovered in favor of petitioner and against the United States, in the court of claims, for \$71,020.

His petition further states that in July, 1873, and more than three years after the discharge of the petitioner in the bankrupt court, John B. Raymond his assignee had procured himself to be substituted for the petitioner as plaintiff in the said suit in the court of claims; that but one debt had been proved against the estate of the petitioner, and that for the sum of \$2,000 only; and that said assignee intended to collect said judgment and hold said money, and refused to recognize the compensation due to the said counsel of petitioner.

The petition prayed that the counsel of petitioner should be paid their said fees out of the fund when recovered, and that petitioner should be allowed to deposit in the registry of the court a sufficient sum to cover all claims against him and all costs and commissions of the assignee, and that the remainder of the proceeds of said judgment should be paid to petitioner.

After the filing of this petition and before a decree was made thereon, the judgment of the court of claims had been affirmed by the supreme court of the United States, and the amount of the judgment was drawn from the treasury of the United States and was in the custody of the bankrupt court.

Before the decree was made upon said petition other proofs of debt had been filed against the estate of said Maybin, in addition to said claim of \$2,000, so that the debts filed against the said estate amounted to about \$26,000. These debts however, it was claimed by Maybin, were not valid claims against his estate.

Raymond, the assignee of Maybin, filed an answer to this petition in

which, besides denying many of the averments of the petition, he alleged that Maybin had fraudulently neglected to place the said claim against the United States upon his bankrupt schedules. That in March, 1873, he discovered that the said Maybin was then prosecuting said claim in the court of claims, and thereupon he, the assignee, filed his petition in the district court setting forth that said claim had come to his knowledge, that it would be necessary to employ an attorney to prosecute the same, that he had no funds for that purpose, and that it had been customary for such claimants to employ an attorney at a compensation of one half the amount recovered, and praying for authority to make a contract with an attorney for the collection of said claim on those terms; that the authority was given, and he made a contract with Messrs. Adam & Speed, attorneys, dated March 22, 1873, by which he employed them to prosecute said claim, and agreed to pay them for their services one half the gross proceeds of said claim when recovered.

Adam & Speed, who had associated with themselves in the prosecution of this suit Mr. S. E. Jenner, of Washington city, filed on October 2, 1875 a proof of their claim against the bankrupt's estate, in which they claimed that there was due them and said Jenner from the bankrupt's estate the sum of \$35,510, by reason of their services under the contract aforesaid, and that they held an attorney's lien upon the judgment for \$71,020 which had been recovered in May, 1875, in the court of claims, in favor of said assignee.

After due notice to all the parties in interest, and the taking of much testimony on both sides, the petition of Maybin came on for hearing before the district judge sitting in bankruptcy on the 3d of June, 1876, and he made a decree.

The decree found that there was on deposit in the Valley Bank of Vicksburg the proceeds of said suit in the court of claims, the sum of \$71,020, subject to the order of the court in the cause, — and directed its distribution as follows: To Raymond, the assignee, for his commissions on receiving and paying over said moneys, the sum of \$810; to S. E. Jenner, or Adam & Speed, his associates, \$579.46, being an amount paid by Jenner to Bartley & Casey, the attorneys for Maybin, and which sum was properly chargeable to the attorneys of said Maybin; to Harris & Harris, and Bartley & Casey their associates, \$34,526.54; to Adam & Speed and S. E. Jenner, \$17,552. $\frac{4}{9}$; and the court decreed that the remainder of the fund be held by said Valley Bank until the further order of the court.

Maybin, the bankrupt, has filed a petition to review this decree, in which his main ground of complaint is the allowance made to Adam & Speed and Jenner. And Raymond, the assignee, has also filed a petition of review in which he complains of so much of the decree as allows to Harris & Harris and Bartley & Casey the said sum of \$34,526.54. The other facts necessary to an understanding of the controversy are stated in the opinion of the court.

The parties in interest were represented as follows: For Harris & Harris and Bartley & Casey appeared Messrs. *W. B. Pittman*, *A. B. Pittman*, *T. W. Bartley* & *Joseph Casey*; Mr. *W. B. Pittman* also appeared for Maybin.

Messrs. *G. Gordon Adam & Dickey* appeared for Adam & Speed and Jenner, and for Raymond, the assignee.

WOODS, Circuit Judge. The respondents to the supervisory petition of review filed by Raymond, the assignee, have entered a motion which raises a preliminary question that first requires the attention of the court. The motion is to dismiss the petition because this court is without jurisdiction to entertain the same, the decree sought to be reviewed being either a decree in equity or the allowance of the claim of creditors, and therefore not reviewable by supervisory petition.

I do not think this motion ought to prevail. The petition of Maybin was in the ordinary course of a bankrupt proceeding. Its main purpose was to secure to himself any surplus that might remain of his estate after paying all the claims upon the fund, and all debts due from him. It certainly was not necessary to present such a prayer by a regular bill in equity. The fund at the time of the decree was in the registry of the court, and Maybin's petition amounted simply to a motion to distribute the fund to those having claims against it and to pay him the residue. Nor does the decree appear to be the allowance of a claim in favor of Harris & Harris and Bartley & Casey. They were the owners by equitable assignment of one half the fund, if what they alleged about their contract with Maybin was true. They did not set up a debt due to them against the bankrupt estate, but a title to one half the fund. The decree that they be paid out of the fund was not the allowance of a claim against the estate from which, by the provisions of original section 8 of the bankrupt act (Rev. Stat. 4980) an appeal might be taken.

"The assignee of a bankrupt is not the assignee of his creditor, nor of all the judgments, executions, liens, and mortgages outstanding against his property. He takes only the bankrupt's interest in the property; he has no right or title to the interest which others have therein, nor any control over it further than is expressly given by the bankrupt act as auxiliary to the preservation of the bankrupt's interest for the benefit of his general creditors." *Goddard v. Weaver*, 1 Woods, 259.

In the district court the petition of Maybin was treated both by the parties and the court as an informal petition in the course of bankrupt proceedings; and I am disposed to treat it in the same way in this court, and think it was not a bill in equity; nor was the decree of the court the allowance of a claim against the bankrupt's estate.

The motion to dismiss the revisory petition of Raymond, the assignee, is therefore overruled.

As to the merits of the revisory petition of Raymond, the questions are, what contract did Harris & Harris make with Maybin for the prosecution of his claim against the United States, and what were their rights under that contract?

In my judgment the proof is clear and conclusive that one or two years before Maybin filed his petition to be adjudicated a bankrupt he entered into a written contract with Harris & Harris, by which the latter agreed to prosecute said claim against the United States, and pay all costs and expenses of said prosecution, and for their said services they were to have one half the net proceeds of the claim, and the other half was to be paid to said Maybin; that Harris & Harris, by themselves and those whom

they associated with themselves, did prosecute said claim in the court of claims and in the supreme court of the United States, and did recover therein final judgment for \$71,020, which amount is now in the registry of the district court.

Under this state of facts there can be no doubt of the right of Harris & Harris and their associates to one half the net proceeds of the fund, notwithstanding the fact that, during the pendency of the cause in the court of claims, Maybin had been adjudicated a bankrupt, and before the recovery of the judgment in that court Raymond, his assignee, had been made a party plaintiff to the suit. Harris & Harris and their colleagues were not only willing to prosecute the suit after the bankruptcy and after the assignee was made party, but actually did prosecute it to a successful final judgment and recovery of the money. These services were accepted by the assignee, and he now enjoys their fruits. When their services had been rendered according to their contract, and the money recovered, they had a title to one half the amount. When Raymond was appointed assignee the claim of Maybin vested in him, subject to the rights of Harris & Harris under their contract, which was in no way affected by the bankruptcy. As long as they were willing to perform their part of the contract they were entitled to insist upon their rights under it.

These rights of Harris & Harris and their associates were recognized not only by the district court but also the court of claims. The district court, in an order dated November 28, 1873, directed Raymond, as assignee, to prosecute said claim in the court of claims, and declared that all costs and expenses incurred by said bankrupt, including his counsel fees for the prosecution of said claim before the substitution of said assignee, should be paid out of the amount which might be paid into court to be thereafter determined by the court.

And in the order of the court of claims, made on February 23, 1874, by which S. E. Jenner was made attorney of record for said Raymond as assignee of Maybin, instead of Bartley & Casey, it was provided that Bartley & Casey should have and retain a lien upon the cause of action, and upon the papers and effects of the said Maybin, and upon any judgment which might be recovered in the case, to the amount of such contingent fees and costs as it was agreed by or on behalf of said Maybin that his original attorney should receive for professional services for prosecuting the case.

The order of the district court authorizes the assignee to prosecute the claim in the court of claims, and the order of the court of claims substituting the attorney of the assignee as attorney of record, both took care to preserve the rights of Maybin's attorneys under their original contract for fees.

It is objected that the contract made between Maybin and Harris & Harris is champertous, and therefore void.

"Champerty," says Blackstone, "is a species of maintenance, being a bargain with the plaintiff or defendant *campum partire* if they prevail at law. Whereupon the champertor is to carry on the party's suit at his own expense."

The common law notions of champerty and maintenance have never

fully obtained in this country, because the reason upon which they were founded in England did not exist here.

In the case of *Slywright and Page*, 1 Leon. 167, it was said by the whole court of common pleas that the meaning of the statute of the 32 Hen. 8, concerning maintenance, was "to repress the practices of many who, when they thought they had title or right to any land, for the furtherance of their pretended right conveyed their interest in some part thereof to great persons, and with their countenance did oppress the possessors."

Blackstone speaks of the offence of champerty as "perverting the process of law into an engine of oppression."

The same reasons were given for the rule of the common law that a *chose in action* could not be assigned. "Nothing," says Coke, "in action, entry, and reentry can be granted over, for or under color thereof pretended titles might be granted to great men whereby right might be trodden down and the weak oppressed." Co. Litt. 14 a.

It has been well remarked that feeble, partial, and corrupt must have been the administration of justice when such a reason could have force. *Thalhimer v. Brinkerhoff*, 3 Cow. 543.

The rule that a *chose in action* cannot be assigned has long since been exploded, because the reason upon which it rested has ceased to exist. And the ideas of the guilt of champerty and maintenance have measurably disappeared, and generally it is not now considered in this country a crime to aid the lawful suit of another with money and services, in consideration of a share in the recovery. *Thalhimer v. Brinkerhoff*, *supra*; *Lyth v. State*, 17 Ark. 608; *Bayard v. Lane*, 3 Harr. (Del.) 139.

Where the government is defendant, the grounds upon which the offence of champerty were supposed to rest cannot, in the nature of the case, exist. In such cases as the one under consideration, the government invites the suits of her citizens having lawful claims, and is in no danger of suffering injustice, no matter how great and influential those are who are aiding in their prosecution. The objection that the contract under consideration is champerty cannot therefore prevail.

It seems to me clear that the district court, in making the decree now under review, did right in directing the payment of the compensation of Harris & Harris and Bartley & Casey out of the fund. Maybin, when competent to contract, had agreed to pay them this compensation, and they had, without objection by the assignee, rendered the services and accomplished the object for which the allowance was made. Therefore, unless some obstacle appears in the consideration of other questions raised in the case, that part of the decree of the district court under consideration ought to be affirmed, and the petition of review filed by Raymond dismissed.

The questions referred to are made by the counsel for Maybin upon his petition to review so much of the decree of the district court as allowed Adam & Speed and Jenner the sum of \$17,552.

The objections upon which the counsel for Maybin rely reach to the entire decree of the district court. They assert that the district court had no jurisdiction to make the decree. They claim this on several grounds: First. Because the proceeding in bankruptcy was completed and concluded before Raymond was authorized to prosecute the claim in the court of claims, and that the court had therefore no authority to make that order

or any subsequent order in the bankruptcy. This view is based on the alleged fact that the bankrupt Maybin, having been discharged about the 25th of January, 1870, Raymond, his assignee, was subsequently, but soon after also discharged, and that this ended and closed the bankruptcy proceedings, and all proceedings thereafter in said bankruptcy were without jurisdiction, and void.

If the facts as claimed were borne out by the record, I should feel inclined to hold on this point with the attorneys for Maybin. But as I read the record, Raymond never was discharged as assignee. It is true a discharge written upon a printed blank, without date and signed by the register, is found among the files of the bankruptcy of Maybin, and doubtless this discharge was signed by the register soon after the date of the discharge of the bankrupt himself.

But it appears farther from the record that on April 10, 1873, Raymond filed a petition in the district court, in which he represented that he was embarrassed in the performance of his duty as assignee, by the said paper purporting to be his discharge as assignee; that said paper was signed without being applied for; that the date was purposely omitted, and that it was inadvertently put by the register among the papers in the cause, when they were returned into court.

Upon this petition the court acted, and found that said discharge was inadvertently made and filed in said cause, and ordered it to be annulled.

The mere inadvertent filing of a discharge among the records of a cause does not paralyze a court and put an end to the case. A court at any time, on the truth being made to appear, would have the power to order such a paper to be stricken from the files.

"A court has power at a subsequent term to set right mere forms in its judgments, to correct misprisions of its clerks, and to correct any mere clerical errors so as to conform the record to the truth." *The Bank v. Labilat*, 1 Woods, 13.

When therefore it was made to appear that the discharge of an assignee had inadvertently found its way among the files of the court, the court had power to order the paper to stand for naught, and the assignee to proceed in the discharge of his duties; and this the court did. The assignee was, therefore, in fact never discharged.

Second. It is further claimed, that the discharge of the bankrupt on January 25, 1870, was an adjudication that he had surrendered all his property for the benefit of his creditors, and that the assignee had no right, although he might afterwards discover property of the bankrupt which the bankrupt had failed to put upon his schedules, to bring it into the bankruptcy without first setting aside the discharge of the bankrupt; that this had never been done, and that the time within which it could be done had elapsed.

I do not think that the discharge of a bankrupt was intended to have the effect claimed.

Generally, a bankrupt may apply for his discharge at any time after the expiration of six months, and if no debts have been proved and no assets have come to the hands of the assignee, he may apply after the expiration of sixty days from the adjudication.

A discharge once granted can only be annulled on the ground of fraud.

Rev. Stats. §§ 5110, 5120. So that if the theory under consideration is correct where a bankrupt inadvertently omits property from his schedule and gets his discharge fairly, newly discovered assets can never be reached by the assignee, because the discharge can never be set aside. An interpretation of the law which leads to such results must surely be unsound.

The fact is, that the adjudication of bankruptcy vests in the assignee the title to all property of the bankrupt not exempt, whether the same is placed on the schedules or not; and without reference to the discharge of the bankrupt it is the duty of the assignee to collect the assets, and apply them to the payment of the debts, and a discharge of the bankrupt interposes no obstacle to the performance of this duty.

Third. It is claimed that if the assignee acquired any right to the claim of Maybin against the United States, he is barred of that right because he did not prosecute it within two years; that is to say, because he did not have himself substituted for Maybin as plaintiff in the suit pending in the court of claims until after the expiration of two years from his appointment as assignee. Rev. Stat. § 5057.

If it be conceded that under the circumstances the assignee was barred, it seems clear that Maybin cannot now avail himself of that fact. The limitation is for the benefit of defendants in the actions prosecuted by the assignee. If the limitation of the statute was effectual to bar the assignee, the United States might have set up the bar. But that was not done; after the suit of the assignee has been allowed to progress to judgment, and the money has been collected by him, it seems to be too late for the bankrupt to intervene and set up the bar of the statute.

I am of opinion, therefore, that none of the grounds relied on by counsel for Maybin, to show that the district court had no jurisdiction to make the decree complained of, are well taken.

This brings up the merits of the revisory petition filed by Maybin. The petition claims that the allowance by the district court to Adam & Speed and Jenner of \$17,552.50 was not justified, and I think the objection to this allowance is sustained by the facts of the case. It is made perfectly clear by the record that the court when it authorized Raymond, the assignee, to employ an attorney to prosecute the claim of the bankrupt against the United States, for the compensation of one half the amount recovered, did so in ignorance of the facts of the case; and that this ignorance resulted from the suppression by the assignee of facts which must have been known to him, and the fact of such suppression was known to the attorneys with whom he subsequently contracted. It is not to be supposed that if the court had been advised that the claim of Maybin was already in course of prosecution in the court of claims, and almost ready for judgment, and that the attorneys prosecuting the claim had a contract with Maybin for one half the amount to be recovered for their compensation, that under these circumstances the court would have authorized the employment of other counsel for the assignee, who was to receive the other half of the money for their services. The petition filed by the assignee for authority to employ counsel left the court in the dark as to the real state of the case; and the order of the court allowing the assignee to employ counsel who were to receive one half the recovery for their services was not binding upon the court or the parties.

But aside from this, the services which Adam & Speed contracted to render, and for which they were to receive one half the amount recovered by them, were never rendered.

What were the services they agreed to perform? The petition of the assignee for authority to employ counsel represented that among the assets of the bankrupt there was a claim against the United States for cotton taken from bankrupt's plantation; that in the prosecution of said claim it would be necessary to employ counsel; that it was customary in such cases for the claimant to enter into contract with the attorney to pay him for his services in the collection of the same fifty per centum of the amount recovered, the claimant to be at no further expense in making said collection; and the petition prayed that petitioner be authorized to employ counsel to prosecute the claim on the said terms, and the court authorized the contract to be made as prayed for in the petition.

In pursuance of this authority the assignee, on the same day the authority was given, entered into a contract in writing with Adam & Speed and Jenner, by which they agreed "to prosecute and recover a certain claim or debt due and owing to the estate of said bankrupt by and from the United States, for and on account of cotton taken from bankrupt's plantation during the rebellion." And the assignee agreed to pay them one half the amount recovered for their services.

From all this it appears that what Adam & Speed and Jenner were employed to do, and what they agreed to do, and for the doing of which they were to receive one half the amount recovered, was to prosecute and recover the claim against the United States. This they did not do, nor did they assist in doing. The record shows that the suit against the United States was prosecuted solely by Harris & Harris and their associates, and it fails to show any service performed by Adam & Speed and Jenner, or either of them, towards the recovery of the judgment against the United States.

Adam & Speed and Jenner did perform services for the assignee about the claim, but they were not the services contemplated by the order of the court or by the contract between the assignee and them. These services were the procuring the substitution of the assignee as plaintiff in the court of claims in place of the bankrupt, and the having Jenner substituted as attorney of record for plaintiff in place of Bartley & Casey. Doubtless these services were valuable to the estate of the bankrupt. They prevented the fund when recovered from going into the hands of Maybin, the bankrupt, and secured the possession of it to Raymond, the assignee. But the prosecution of the claim and the recovery of the money from the United States, by the final judgment of the supreme court, was done by Harris & Harris and their associates, and not by Adam & Speed and Jenner. It never entered into the contemplation of the court that Adam & Speed and Jenner were to be paid fifty per cent. of the recovery for preventing the fund from going into the possession of the bankrupt, and that the other fifty per cent. was to be paid to the attorneys of the bankrupt for their services in recovering the fund as against the United States.

In my opinion Adam & Speed and Jenner cannot claim under said contract: —

(1.) Because the authority to make it was conferred by the court without a knowledge of the facts which the assignee must have known, and was

bound to communicate; and (2.) Because none of the services contemplated by the order of the court and the contract between Adam & Speed and Jenner were performed. The services actually rendered were not those for which the assignee was authorized by the court to pay fifty per cent. of the recovery.

But nevertheless Adam & Speed and Jenner have performed a valuable service to the bankrupt's estate, and they should be paid for such services what they are reasonably worth.

The result of my views is, that the petition of review filed by John B. Raymond, assignee, must be dismissed at the costs of the bankrupt estate, and that so much of the decree as directs the payment to Harris & Harris and Bartley & Casey of \$34,525.54 must be affirmed.

That so much of the revisory petition filed by J. W. Maybin, as complains of the order directing the payment to Adam & Speed and Jenner of \$17,552.50 by said assignee be sustained, and so much of said decree as directs the payment to said attorneys of said sum be reversed; and that the district court be required to ascertain in such manner as shall seem to it most proper what sum of money is due to Adam & Speed and Jenner for their services in the premises, and to direct the payment to them of such sum out of the fund.

SUPREME COURT OF PENNSYLVANIA.

(To appear in 29 P. F. Smith.)

EXPRESSION OF OPINION AS TO FACTS BY COURT. — ACTION FOR DEATH CAUSED BY EXPLOSION OF UNSAFE OIL. — EVIDENCE. — *RES GESTÆ*.

ELKINS, BLY & CO. v. McKEAN.

1. In a suit against a refiner and vendor of petroleum, for the death of plaintiff's husband, alleged to have been caused by the explosion of the oil, the allegation and evidence of plaintiff were that the oil exploded in a lamp in his hand whilst he was walking quietly; the defendant's allegation and evidence were that the death was caused by his tripping and falling with the lamp in his hand. In charging, the court said, "Was the death occasioned by the explosion at the time and in the manner claimed by the plaintiff? In regard to this there can be no doubt whatever." *Held* to be error; whether the death was caused by the explosion as alleged by the plaintiff was for the jury.
2. The declaration averred that the defendants wilfully sold the oil for lighting purposes, "knowing that it was highly inflammable, explosive, and unsafe," &c. There was evidence that the oil had been sold by defendants, but none that the sale was with wilful knowledge of its dangerous character: *Held* to be error to submit the case to the jury.
3. Statements as to the cause of the accident made by the deceased at and about the time of its occurrence, whilst he was covered with fire, were competent evidence as part of *res gestæ*.
4. The fact that the oil had passed through a number of intervening vendors before it was procured by the deceased would not prevent a recovery against the defendants, if their guilty knowledge and the identity of the oil were established.
5. The responsibility of the manufacturers would attach from their putting the oil on the market and holding out that it might be safely used as illuminating oil.

THIS was an action on the case to April term, 1873, of the court below, brought by Elizabeth McKean against George W. Elkins and others, trading as Elkins, Bly & Co.

There were three counts in the declaration:—

1. That defendants were manufacturers and vendors of carbon oil for illuminating purposes; that James A. McKean, the husband of plaintiff, purchased a quantity of oil to be used in a lamp; that defendants, knowingly, wilfully, and of their mere negligence, manufactured and sold, for illuminating purposes, oil that was highly inflammable, explosive, unsafe, and dangerous, knowing it to be such; that James A. McKean purchased the same, and whilst using it in a lamp in a proper and prudent manner, the oil exploded and caught fire, the burning oil was scattered over McKean, and so burned him that he died.

2. That the defendants being such manufacturers and vendors of oil, did knowingly, fraudulently, and maliciously put upon the market, &c., certain carbon oil, representing it to be of a safe and reliable quality of the fire test of 110°, well knowing that the oil so sold by them for illuminating purposes was in fact highly inflammable, explosive, and dangerous; that McKean, relying upon these representations, purchased from vendors of the defendants a quantity of the oil, and whilst using it in a lamp, the oil took fire and exploded the lamp, and he was burned, and died from the burns.

3. That the defendants, being manufacturers of such carbon oil, put upon the market oil, and sold a certain carbon oil marked as 110° fire test; that it was the duty of the defendants, their agents, and servants, to take reasonable and proper care that the oil should be safe and not inflammable or explosive, or give notice that it was thus dangerous, yet they knowingly, carelessly, and negligently sold the oil, knowing it to be unsafe and dangerous; that McKean, in the course of trade, purchased the oil from those to whom the defendants sold it, not knowing that it was dangerous, and in using it he was burned, and died.

The plea was, "Not guilty."

The case was tried December 1st, 1874, before Kirkpatrick, J.

The plaintiff testified that her husband, on Tuesday, the 11th of February, 1873, went into his cellar to turn off the water, having a lighted lamp in his hand; it was an opaque white glass lamp with a blue rim; after he had been in the cellar about ten minutes, witness heard cries for help and went to the cellar; she saw him on fire, his clothes burned; he was in the cellar about midway between where the water was to be turned off and the stairs; the lamp was still burning; he died the next day. The oil had been purchased by McKean on the preceding Saturday.

It was proposed to ask the witness what her husband said as to the cause of the accident at or within a few moments of the time when she found him covered with flames in the cellar and apparently dying, as a part of the *res gestæ* and with a view to show that the burning and death were caused by the explosion of the oil in the lamp carried by the deceased, and to establish its defective and dangerous character.

Defendants objected to the offer as irrelevant and incompetent for the purpose set forth in the offer. The evidence was admitted and a bill of exceptions sealed for the defendants.

Witness proceeded: "I asked him how it happened; I asked him if he had tripped on anything. This was in the cellar, when I went down. He said he had not, that he was walking along the cellar calmly and peaceably and he heard a noise, and before he could realize what it was, the whole top flew off the lamp and the oil came down all over him.

The coroner of Alleghany County testified that he was present at a test made of illuminating oil, which he procured for the purpose, after the accident occurred, at the store of Steele & Hart; it was furnished by Mr. Steele himself from a tin can; it was put into a "pop-bottle;" there was a boy in the store at the time. He testified also that the lamp was at the coroner's inquest proved to be that which McKean had, and in which the oil exploded; that it was a white lamp with a blue streak around it.

The fire marshal of Pittsburg accompanied the coroner to procure the oil for the test; he testified as the coroner had done.

Robert Fedder, the boy spoken of by the coroner as being in Steele & Hart's store, testified that in February, 1873, McKean bought oil at that store; the witness sold it to him; he filled a lamp, such as is described above, and such an one as he also saw at the coroner's inquest; he got it from a can in the store used for holding oil; Steele & Hart had bought the store from Caskey, and the oil that was in the can was bought from them with the rest of the store; when the coroner and the fire marshal got the oil for a sample from Mr. Steele, it was taken from the can which was the only can they had in the store; there had been no oil put into the can from the time he had filled McKean's lamp up to the time the oil had been given to the coroner; it was the same oil that was in the can when Steele & Hart took the store; there was one oil barrel in the store, but it had no oil in it; the barrel came from Caskey's; the brand "Elkins Bly & Co.," and "110° fire test," was on the barrel; the oil that was in that barrel was put into the can, and no other oil had been put into the can for about two or three weeks before he filled the lamp. Steele & Hart had no oil in the store but what they bought from Caskey; they bought Caskey out about the 16th of January.

Samuel Steele, of the firm of Steele & Hart, testified that the firm purchased W. J. Caskey's store on the 16th of January, 1873, and amongst other things about thirty gallons of oil in a large tin can; they had purchased from Caskey no oil in barrels, — none except that in the can; shortly after McKean's death, witness gave to the coroner oil out of the tin can; there was but one tin can; he gave him a "pop bottle" full; witness had purchased a barrel of oil from Arbuckle & Co., on Monday, the 10th of February, the day before McKean was burned; the oil he gave to the coroner was from this barrel, and not from that which he had got from Caskey; that which was got from Arbuckle & Co. was put into the tin can; witness knew nothing of the oil the firm got from Caskey, except that it was in the tin can; the can was empty when Arbuckle's oil was put into it; witness put the oil they got from Arbuckle & Co. into the empty barrel, and returned to Elkins, Bly & Co.; the oil given to the coroner was Elkins, Bly & Co.'s Riverside oil; witness did not know anything of the oil that had been in the can previously to that which he put in from the barrel bought from Arbuckle & Co. Neither this witness nor his partner, Hart, who was examined, could tell the brand on the oil

barrel which they got from Caskey; that barrel was empty when they got it.

J. M. Torrence, salesman for Arbuckle & Co., testified: On or about January 11, 1873, that firm sold oil to Caskey; it was the Riverside brand manufactured by Elkins, Bly & Co.; the brand on the barrel was "Elkins, Bly & Co.," the name of the oil would be carbon oil; it was called Riverside oil; that was the name of the refinery. The fire test at that time for Pennsylvania was 110°, and it was marked on the barrels; no oil was sold to Caskey after January. Steele & Hart bought a barrel February 10th. Witness took the inventory of Caskey's goods at the time of his sale to Steele & Hart; he then saw a barrel then in the cellar, but did not examine if there was oil in it; he saw the tin can from which they retailed upstairs; the oil purchased by Arbuckle & Co., and sold to Caskey and Steele & Hart, was purchased from Elkins, Bly & Co.; Arbuckle and Co. never drew the bungs; they sold the oil as they received it in perfect confidence, relying on the manufacturers. All the recollection of the witness was from the entry in the book, and he inferred that it was the Riverside brand, because they kept no other. "They may have bought that barrel of oil from somebody else, but our books show a sale of a barrel of oil. I don't claim to have any personal knowledge of the sales at all." Witness did not know that the Arbuckles bought from Elkins, Bly & Co., except by the books; Arbuckle bought directly from the manufacturers. Oil the Arbuckles would sell in January and that they would sell in February would not come from the same lot. The way they purchased oil from Elkins, Bly & Co. was to buy a lot and take it away as they needed it; all their oil was bought from Elkins, Bly & Co.

W. J. Caskey testified that in January, 1873, he sold his store to Steele & Hart; amongst other things about one third of a barrel of oil in a tin can; the oil was purchased from Arbuckle & Co.; he did not recollect the brand of the oil; on the day after the death of McKean he was at Steele & Hart's store, and saw some oil taken out of the can; the oil was tested in the way they usually tested it, by drawing a match on it; it ignited, he had often done that before and it put the match out; witness could not tell whether that was the same oil he had sold to Steele & Hart; witness had been getting oil from different places; the last few barrels he had got from Arbuckle; he bought most of his oil from Arbuckle; he had frequently tested the oil he got from Arbuckle by a match, and it put it out; what he got from Arbuckle always stood the test.

Plaintiffs proposed to show by J. R. Neald, United States Inspector of Steamboats, to show the tests applied (and their results) to the oil obtained from Coroner West and Fire Marshal Butler, and which they obtained from Steele & Hart, alleged to be part of the same sold by them to deceased, and manufactured and sold by Elkins, Bly & Co., defendants, to the said Steele & Hart, and this to prove that the oil manufactured and sold by them, and by which deceased came to his death, was defective and dangerous.

The defendants objected to the above.

First, because the plaintiffs have proved in chief that the oil subjected to test was not the same oil which was in the lamp alleged by them to have exploded and caused the injuries complained of.

The objection was overruled and a bill of exceptions sealed for defendants.

The plaintiff gave other testimony in support of her case, not bearing on the question whether the oil in McKean's lamp had been manufactured and sold by defendants as safe illuminating oil. For defendants Emma Bear testified that at the time McKean was burned, his wife, the defendant, came up out of the cellar saying her husband had tripped over a piece of wood and fallen.

The defendants gave evidence also for the purpose of showing that the oil by which McKean was injured was not oil sold by defendants as safe illuminating oil, and that the oil tested for the coroner's inquest was not the oil from which McKean had procured that used in his lamp.

The court charged:—

... ["The first question will be was the death of James B. McKean occasioned by the explosion at the time and in the manner claimed by plaintiff. In regard to this there can be no doubt whatever.]

"The next question will be was the identical oil which caused his death manufactured and sold by defendants as claimed by plaintiff? If it was not, there can be no recovery and your verdict must be for the defendants, and the burden of showing to your satisfaction that it was the identical oil rests upon the plaintiff; they having alleged it, the burden of proof is upon them. If you should get beyond this question, the next one which presents itself, and possibly the most important question in the case, is, did the defendants wilfully and maliciously put it upon the market knowing it to be, as they allege in their declaration to be, unsafe, explosive, dangerous, and unfit for illuminating purposes; because if they did not, under these allegations contained in this declaration or statement of their cause of action, there can be no recovery, and your verdict must be for the defendants. Here again, too, we must remind you the burden of proof is upon the plaintiff, and the necessity of satisfying you in this important particular is a labor which the law wisely imposes upon them, and from which they cannot escape. If they have not so satisfied you, as I have already intimated, there can be no recovery, and your verdict must be for the defendants." ...

The following are points of defendants; they were all refused:—

2. "If the jury find that the oil in controversy was sold in large quantity to Arbuckle & Co. by the defendants, Elkins, Bly & Co., by Arbuckle & Co. to W. J. Caskey, by W. J. Caskey to Steele & Hart, and by Steele & Hart to the deceased, the plaintiff cannot recover in this action."

3. "There is no evidence in this case which would justify the jury in finding that defendants knowingly and wilfully sold the oil, and that it was highly inflammable, unsafe, and dangerous."

6. "Under the pleadings and evidence, the plaintiff is not entitled to recover."

The verdict was for the plaintiff for \$3,500.

The defendants took a writ of error; they assigned for error:—

1. Admitting evidence of the declarations of the deceased.
2. Admitting evidence of the tests applied by the coroner's inquest.
3. The part of the charge in brackets.

4-6. The answers to defendants' points.

Duff & Leggat and *Marshall & Patterson*, for plaintiffs in error. The action for McKean's death could be sustained only against those who sold the oil to him. If it had not been for the intervention of a third party, the defendants' negligence would have produced no injury to McKean; the defendants therefore are not liable. Wharton on Negligence, §§ 184, 439, 440; *Loser v. Clute*, 51 N. Y. Rep. 494; *Pennsylvania Railroad Co. v. Kerr*, 12 P. F. Smith, 353; *Carter v. Town*, 108 Mass. 507.

W. O. Crawford, A. L. Pearson & W. D. Moore, for defendant in error. The persons who manage dangerous agencies by which others may be injured are responsible for negligence; Wharton on Negligence 781, 786; although there may be intervening agents. *Norton v. Sewall*, 106 Mass. 507; *Thomas v. Winchester*, 2 Selden, 397; *Dixon v. Bell*, 5 M. & S. 198; *Carter v. Town*, 98 Mass. 567; *Oil Creek & A. R. Railway v. Keighron*, 24 P. F. Smith, 316; *Barney v. Bustenbinder*, 7 Lansing, 210. If one sells a dangerous and explosive fluid without giving notice of its character to a person ignorant of such character, he is liable. *Wellington v. Downer Ker. Oil Co.* 104 Mass. 64. As to remote and proximate cause they cited *Morrison v. Davis*, 8 Harris, 175; *Lockhart v. Lichenthaler*, 11 Ib. 164; *Scott v. Hunter*, Ib. 195; *Fleming v. Bock*, 12 Ib. 313; *Pittsburg v. Grier*, 10 Ib. 54; *McGrew v. Stone*, 3 P. F. Smith, 441; *Pennsylvania Railroad Co. v. Kerr*, 12 Ib. 367.

Chief Justice AGNEW delivered the opinion of the court, January 6, 1876.

This was an action by the widow of James McKean against Elkins, Bly & Co., manufacturers of refined petroleum or carbon oil. McKean died of burns received, either from the explosion of a lamp carried in his hand, or from a fall breaking the lamp and setting the oil on fire. The action was founded on the allegation that the defendants wilfully made and sold the oil for lighting purposes, knowing that it was highly inflammable, explosive, and unsafe, and therefore unfit for use as a light. The case went to the jury distinctly on this proposition, the judge having charged in these words: If you should get beyond this question (to wit, the identification of the oil as made by the defendants), the next one which presents itself, and probably the most important question in the case, is, did the defendants wilfully and maliciously put it upon the market knowing it to be, as they allege in their declaration, unsafe, explosive, dangerous, and unfit for illuminating purposes; but if they did not, under these allegations contained in this declaration or statement of their cause of action, there can be no recovery, and your verdict must be for the defendants." According to this instruction no question of mere negligence, in putting the oil upon the market, arose or was presented to the jury; but their verdict of necessity must be founded upon the evidence of a wilful sale of such unfit oil, with a full knowledge of its inflammable and explosive character. Upon this precise statement the fifth and sixth assignments of error arise, that the court refused to say there was no evidence which would justify the jury in finding that the defendants knowingly and wilfully sold the oil, and that it was highly inflammable, unsafe, and dangerous; and also that under the pleadings and evidence the plaintiff was not entitled to recover. Upon a careful review of the whole evi-

dence there appears to be none to justify the submission of the fact of the wilful sale by the defendants of such an explosive and unfit oil for burning purposes with such a wilful and malicious knowledge as that set forth in the instruction. Indeed there is no evidence what the precise business of Elkins, Bly & Co. was — what they manufactured, or what they sold; or that the oil in question coming from their house was sold as illuminating oil. That they made and sold illuminating oil appears from the barrels bearing their name, and the fire test, 110°, marked upon them, and from the testimony of J. M. Torrence; but that their business was confined to this branch alone does not appear. The contrary may well be inferred from the nature of the business of distilling crude petroleum in which various products are given off, used for different purposes. That the oil in the can out of which Steele & Hart filled McKean's lamp came from the manufactory of the defendants may also be inferred from the evidence; but that this particular oil was sold by them as illuminating oil appears nowhere. The only testimony tending to identify the purchase of this oil, as from the defendants, is that of J. M. Torrence, the salesman of Arbuckle & Co. who sold the oil to Caskey. But Torrence does not undertake in the slightest degree to identify the sale of this particular oil, or to state for what purpose it was sold by the defendants, or to prove facts which would show that if it was the same oil, it was not delivered through accident, but must have been an intentional sale for lighting purposes of a product known by them to be below the proper fire test. The sum of his testimony is that Arbuckle & Co. were in the habit of buying large quantities at a time of oil in barrels, and having it delivered in small quantities to suit their sales, and that the books of Arbuckle & Co. show the sale of a barrel of oil to Caskey on the 11th or 12th of January, 1873. But Caskey testifies that he frequently tried the oil bought of Arbuckle & Co. and found it always to bear the proper test. The only oil which did not bear the test was that found in the can a day or two after McKean's death; and whether this was the same oil with which McKean's lamp was filled is left to depend upon the contradictory testimony of Steele and the boy Fedder, as to when the new barrel of oil was pumped into the can by Steele. And if it were the same, we are still met by the difficulty that there is no evidence that this particular oil was sold by Elkins, Bly & Co. for illuminating purposes. It may have been sold in a mistake, or may not have been sold as bearing the fire test of 110°, but as one of their other products. Thus, upon the whole evidence, the turning fact of the case, viz.: a sale of this oil for illuminating purposes, with a guilty knowledge of its unfit and explosive character, is wanting in order to support the submission of the fact to the jury. This must reverse the judgment.

The judgment must be reversed also on the third assignment of error, though I am inclined to believe it was an error of inadvertence. "The first question (said the judge) will be, was the death of James B. McKean occasioned by the explosion occurring at the time, and in the manner claimed by the plaintiff? In regard to this there can be no doubt whatever." But if the testimony of Mrs. Emma Bear be believed (and it was for the jury to determine this), McKean's death was the result of his tripping over a piece of wood in the cellar, in consequence of which he

must have fallen and broken his lamp; and was not the result of a mere explosion of the gas in the lamp. The fact of such an explosion stood at the very threshold of the case, and in the face of this contradictory evidence it was too strong an affirmation of the fact, to tell the jury there could be no doubt that McKean's death was occasioned by the explosion at the time and in the manner claimed by the plaintiff. There is no doubt that his death was caused by the burning oil at the time and place claimed by the plaintiff, and this is probably all the learned judge meant. But we must take the record for our guide, and when he said there was no doubt that the death was caused by the explosion in the manner claimed by the plaintiff, he asserted too strongly, in view of the contradictory evidence.

The other assignments of error are not sustained. What McKean said as to the cause of the accident when found enveloped in the flames of the oil, or within a few minutes afterwards, was clearly competent evidence as a part of the *res gestæ*. This is so fully reasoned out and sustained in the following case, nothing can be said to make it plainer. *Tompkins v. Sattruck*, 14 S. & R. 275; *Deardorff v. Hildebrand*, 5 Rawle, 226; *Cattison v. Cattison*, 10 Harris, 275. The case of *Fawcett v. Bigley*, 9 P. F. Smith, 411, was decided on a different principle. This was an attempt to make the narration of an agent of a past transaction evidence against his principal, and was not competent. It was especially so when the agent had an adverse interest to relieve himself by his statements of the consequences of his own negligence.

As to the second assignment of error the reason given for excluding the evidence of the tests applied to the oil was unfounded. On the question of the identity of the oil in the can to which the tests were applied, the testimony of young Fedder and Steele were in direct contradiction. If Fedder were believed Steele did not pump the new barrel of oil into the can until after the oil had been taken out which was the subject of the tests. The case must of necessity have gone to the jury on the facts.

Nor can the fourth assignment of error to the refusal to affirm the defendants' second point be sustained. The substance of that point is, that after the oil had passed from the defendants in large quantities to Arbuckle & Co., and from them in smaller quantities to Caskey, and from Caskey to Steele & Hart, who sold the lampful to McKean, there can be no recovery. The argument in support of this point is founded upon the alleged successive intervening liabilities of the persons through whose hands the oil had passed. But this proposition is unsound as a legal defence. The number of hands through which the oil had passed might furnish a strong argument on the question of identity, and the guilty knowledge of Elkins, Bly & Co. as to this particular oil, but could not constitute a legal bar to recovery, if the identity of the oil and the guilty knowledge were made clear. Certainly one who knowingly makes and puts on the market for domestic and other use such a death-dealing fluid, cannot claim exemption from liability for his terrible wrong, because he has sent it through many hands. The length of its passage may create a doubt of its identity, or that it was sent on its mission of destruction with a full purpose and knowledge of its dangerous qualities, but the facts being established, he cannot escape the consequences of his crime

against society. The maxim, *Qui facit per alium facit per se*, applies as clearly as the maxim, *Sic utere tuo ut alienum non lædas*. When the article is thrown into the current of trade on the faith of the affirmation of its manufacturers, that it is a fit oil for light and can be safely used in the family, or where it may be required for illumination, they cannot follow it, or avert its injuries, or determine how much of the responsibility is due to others. This is made more manifest by the testimony of Mr. Torrence, the salesman. He said: "We never draw the bungs. We sell the oil in perfect confidence, relying on the manufacturers. We sell it as we receive it." And so it may pass onward to the last person who retails it in the same confidence. A manufacturer who sells his product as an illuminating oil bearing the high and safe fire test of 110° when in fact he knows that its fire test will not exceed 64° or 65° by Fahrenheit, and that this is a most explosive and unsafe oil for domestic use, can plead nothing in defence of this wilful, terrible wrong done to a confiding community. He bears within him a heart regardless of social duty, evidencing malice in its legal sense in a high degree. But while the circuit through which the oil has travelled may be insufficient as a legal bar, proof which sustains the fact of a guilty knowledge should be clear in proportion to the great wrong thus charged against one who may be innocent. We have already said that the evidence offered in support of the guilty knowledge in this case was insufficient to be submitted to the jury.

Judgment reversed, and a venire facias de novo awarded.

WILLIAMS, J., concurred in the reversal of this judgment on the third assignment of error, but would not concur on the fifth and sixth assignments.

SUPREME COURT OF THE UNITED STATES.

[OCTOBER, 1876.]

CONSTITUTIONAL LAW.—REGULATION OF COMMERCE.—STATE ENACTMENT TO PROVIDE FOR SAFETY OF PASSENGERS ON VESSELS PROPELLED BY STEAM.

SHERLOCK v. ALLING.

1. Until Congress makes some regulation touching the liabilities of parties for marine torts resulting in death of the persons injured, the statute of Indiana giving a right of action to the personal representatives of the deceased, where his death is caused by the wrongful act or omission of another, applies, the tort being committed within the territorial limits of the state; and as thus applied it constitutes no encroachment upon the commercial power of Congress.
2. The action of Congress as to a regulation of commerce or the liability for its infringement is exclusive of state authority; but until some action is taken by Congress, the legislation of a state not directed against commerce or any of its regulations, but relat-

- ing generally to the rights, duties, and liabilities of citizens, is of obligatory force within its territorial jurisdiction, although it may indirectly and remotely affect the operations of foreign or inter-state commerce, or persons engaged in such commerce.
3. The Act of March 30, 1852, "to provide for the better security of the lives of passengers on board of vessels propelled in whole or part by steam, and for other purposes," does not exempt the owners and masters of a steam vessel and the vessel from liability for injuries caused by the negligence of its pilot or engineer, but makes them liable for all damages sustained by a passenger or his baggage from any neglect to comply with the provisions of the law, no matter where the fault may lie; and in addition to this remedy, any person injured by the negligence of the pilot or engineer may have his action directly against those officers.
 4. The relation between the owner or master and pilot, as that of master and employee, is not changed by the fact that the selection of the pilot is limited to those who have been found by examination to possess the requisite knowledge and skill, and have been licensed by the government inspectors.

MR. JUSTICE FIELD delivered the opinion of the court.

In December, 1858, the defendants were the owners of a line of steamers employed in navigating the river Ohio between the port and city of Cincinnati, in the State of Ohio, and the port and city of Louisville, in the State of Kentucky, for the purpose of carrying passengers, freight, and the United States mail. On the fourth of that month, at night, two boats of the line, designated respectively as *The United States* and *The America*, collided at a point on the river opposite the main-land of the State of Indiana. By the collision the hull of one of them was broken in, and a fire started, which burned the boat to the water's edge, destroying it and causing the death of one of its passengers, by the name of Sappington, a citizen of Indiana. The administrator of the deceased brought the present action for his death in one of the courts of common pleas of Indiana, under a statute of that state, which provides "that when the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury for the same act or omission."

The complaint in the action alleged that the collision occurred within the territorial jurisdiction of Indiana, above the line of low-water mark of the river, and charged it generally to the careless and negligent navigation of the steamboat *United States* by the defendants' servants and officers of the vessel, but especially to the carelessness of the pilot, in running the same at too great a speed down the stream; in giving the first signal to the approaching boat as to the choice of sides of the river contrary to the established custom of pilots navigating the Ohio, and the rules prescribed by the act of Congress; and in not slackening the speed of the boat and giving a signal of alarm and danger until it was too late to avoid the collision.

To defeat this action the defendants relied upon substantially the following grounds of defence: 1st, that the injuries complained of occurred on the river Ohio beyond low-water mark on the Indiana side, and within the limits of the State of Kentucky; and that by a law of that state an action for the death of a party from the carelessness of another could only be brought within one year from such death, which period had elapsed when the present action was brought; and, 2d, that

at the time of the alleged injuries the colliding boats were engaged in carrying on inter-state commerce under the laws of the United States, and the defendants as their owners were not liable for injuries occurring in their navigation through the carelessness of their officers, except as prescribed by those laws; and that these did not cover the liability asserted by the plaintiff under the statute of Indiana.

Under the first head no question is presented for consideration of which we can take cognizance. It is admitted that the territorial limits of Indiana extend to low-water mark on the north side of the river, and the jury found that the collision took place above that mark. It is, therefore, of no moment to the defendants that the supreme court of Indiana held that the state possessed concurrent jurisdiction with Kentucky on the river, under the act of the Commonwealth of Virginia of 1789, providing for the erection of the district of Kentucky into an independent state, and that the legislation of Indiana could, for that reason, be equally enforced with respect to any matters occurring on the river as with respect to similar matters occurring within her territorial limits on the land.

The questions for our consideration arise under the second head of the defence. Under this head it is contended that the statute of Indiana creates a new liability, and could not, therefore, be applied to cases where the injuries complained of were caused by marine torts, without interfering with the exclusive regulation of commerce vested in Congress. The position of the defendants, as we understand it, is, that as by both the common and maritime law the right of action for personal torts dies with the person injured, the statute which allows actions for such torts, when resulting in the death of the person injured, to be brought by the personal representatives of the deceased, enlarges the liability of parties for such torts, and that such enlarged liability, if applied to cases of marine torts, would constitute a new burden upon commerce.

In supposed support of this position numerous decisions of this court are cited by counsel, to the effect, that the states cannot by legislation place burdens upon commerce with foreign nations or among the several states. The decisions go to that extent, and their soundness is not questioned. But upon an examination of the cases in which they were rendered, it will be found that the legislation adjudged invalid imposed a tax upon some instrument or subject of commerce, or exacted a license fee from parties engaged in commercial pursuits, or created an impediment to the free navigation of some public waters, or prescribed conditions in accordance with which commerce in particular articles or between particular places was required to be conducted. In all the cases the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in particular channels, or conditions for carrying it on. Thus, in *The Passenger Cases*, 7 How. 283, the laws of New York and Massachusetts exacted a tax from the captains of vessels bringing passengers from foreign ports for every passenger landed. In the *Wheeling Bridge Case*, 13 Ib. 518, the statute of Virginia authorized the erection of a bridge, which was held to obstruct the free navigation of the river Ohio. In the case of *Sinnot v. Davenport*, 22 Ib. 227, the statute of Alabama required the owner of a steamer navigating the waters of the state to file, before the boat left the port of Mobile, in the

office of the probate judge of Mobile County, a statement in writing, setting forth the name of the vessel and of the owner or owners, and his or their place of residence and interest in the vessel, and prescribed penalties for neglecting the requirement. It thus imposed conditions for carrying on the coasting trade in the waters of the state in addition to those prescribed by Congress. And in all the other cases where legislation of a state has been held to be null for interfering with the commercial power of Congress, as in *Brown v. Maryland*, 12 Wheat. 425; *The Tonnage Tax Cases*, 12 Wallace, 204; and *Welton v. Missouri*, 1st Otto, 275, the legislation created, in the way of tax, license, or condition, a direct burden upon commerce, or in some way directly interfered with its freedom. In the present case no such operation can be ascribed to the statute of Indiana. That statute imposes no tax, prescribes no duty, and in no respect interferes with any regulations for the navigation and use of vessels. It only declares a general principle respecting the liability of all persons within the jurisdiction of the state for torts resulting in the death of parties injured. And in the application of the principle it makes no difference where the injury complained of occurred in the state, whether on land or on water. General legislation of this kind prescribing the liabilities or duties of citizens of a state, without distinction as to pursuit or calling, is not open to any valid objection because it may affect persons engaged in foreign or inter-state commerce. Objection might with equal propriety be urged against legislation prescribing the form in which contracts shall be authenticated, or property descend or be distributed on the death of its owner, because applicable to the contracts or estates of persons engaged in such commerce. In conferring upon Congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation in a great variety of ways may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution.

It is true that the commercial power conferred by the Constitution is one without limitation. It authorizes legislation with respect to all the subjects of foreign and inter-state commerce, the persons engaged in it, and the instruments by which it is carried on. And legislation has largely dealt, so far as commerce by water is concerned, with the instruments of that commerce. It has embraced the whole subject of navigation, prescribed what shall constitute American vessels, and by whom they shall be navigated; how they shall be registered or enrolled and licensed; to what tonnage, hospital, and other dues they shall be subjected; what rules they shall obey in passing each other; and what provision their owners shall make for the health, safety, and comfort of their crews. Since steam has been applied to the propulsion of vessels, legislation has embraced an infinite variety of further details to guard against accident and consequent loss of life.

The power to prescribe these and similar regulations necessarily involves the right to declare the liability which shall follow their infraction. Whatever, therefore, Congress determines, either as to a regulation or the liability for its infringement, is exclusive of state authority. But

with reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, the laws of Congress are silent, and the laws of the state govern. The rules for the acquisition of property by persons engaged in navigation, and for its transfer and descent, are, with some exceptions, those prescribed by the state to which the vessels belong. And it may be said generally that the legislation of a state, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or inter-state, or in any other pursuit. In our judgment the statute of Indiana falls under this class. Until Congress, therefore, makes some regulation touching the liability of parties for marine torts resulting in the death of the persons injured, we are of opinion that the statute of Indiana applies, giving a right of action in such cases to the personal representatives of the deceased, and that, as thus applied, it constitutes no encroachment upon the commercial power of Congress. *United States v. Bevans*, 3 Wheat. 337.

In the case of *The Steamboat Company v. Chase*, reported in the 16th of Wallace, this court sustained an action for a marine tort resulting in the death of the party injured, in the name of the administrator of the deceased, under a statute of Rhode Island, similar in its general features to the one of Indiana. There the deceased was killed whilst crossing Narraganset Bay in a sail boat by collision with a steamer of the company; and though objections were taken, and elaborately argued, against the jurisdiction of the court, it was not even suggested that the right of action conferred by the statute, when applied to cases arising out of marine torts, in any way infringed upon the commercial power of Congress.

In addition to the objection urged to the statute of Indiana, the defendants also contended that as owners of the colliding vessels they were exempt from liability to the deceased as a passenger on one of them, and of course to his representatives, as the collision was caused without any fault of theirs, by the negligence of the pilots; and they relied upon the thirtieth section of the Act of Congress of March 30th, 1852, to provide for the better security of the lives of passengers on board of vessels propelled in whole or part by steam. That act was in force when the injuries complained of in this case were committed, and its principal features have been retained in subsequent legislation. The section provided "that whenever damage is sustained by any passenger or his baggage from explosion, fire, collision, or other cause, the master and the owner of such vessel, or either of them, and the vessel, shall be liable to each and every person so injured to the full amount of damage, *if it happens through any neglect to comply with the provisions of law herein prescribed*, or through known defects or imperfections of the steaming apparatus, or of the hull; and any person sustaining loss or injury through the carelessness, negligence, or wilful misconduct of an engineer or pilot, or their neglect or refusal to obey the provisions of law herein prescribed as to navigating such steamers, may sue such engineer or pilot and recover damages for any such injury caused as aforesaid, by any such engineer or pilot." 10 Statutes at Large, 72.

It was argued that by this section Congress intended the exemption claimed. And confirmation of this view was found in the fact that the owners were obliged to take a pilot, and were restricted in their choice to those licensed by the government inspectors. It was supposed that the relation between owner and pilot, as that of master and employee, was thus changed, and that with the change the responsibility of the former for the negligence of the latter ceased. The court, however, proceeded through the trial upon a different theory of the position of the defendants. It held that as owners they were responsible for the conduct of all the officers and employees of the vessels, and that it was immaterial whether the vessels were or not at the time of the collision under the exclusive charge of the pilots. The instructions to the jury at least went to that extent. They in substance declared that, if the collision occurred within the territorial jurisdiction of Indiana, and was caused, without fault of the deceased, by the carelessness or misconduct of the defendants, or any of their agents, servants, or employees in navigating and managing the steamers, or either of them, the plaintiff was entitled to recover.

In support of the exemption the counsel of the defendants called to our attention an opinion of the supreme court of Kentucky in a similar case arising upon the same collision, where such exemption was upheld. The opinion is marked by the usual ability which characterizes the judgments of that court, but, after much hesitation and doubt, we have been compelled to dissent from its conclusions. The statute appears to us to declare that the owners and masters of a steam vessel, and the vessel itself, shall be liable for all damages sustained by a passenger or his baggage from any neglect to comply with the provisions of the law, no matter where the fault may lie; and that in addition to this remedy any person injured by the negligence of the pilot or engineer may have his action directly against those officers.

The occasions upon which a pilot or engineer would be able to respond to any considerable amount would be exceptional. The statute of England, which exempts the owners of vessels and the vessels from liability for faults of pilots, pilotage there being compulsory and pilots being licensed, has not met with much commendation from the admiralty courts, and the general tendency of their adjudications has been to construe the exemption with great strictness. This course of decision is very fully stated in the exposition of the law made by Mr. Justice Swayne in the case of *The China*, 7 Wallace, where this court declined to hold that compulsory pilotage relieved the vessel from liability. In the case of *The Halley*, Law Reports, 2 Adm. & Eccl. 15, decided as recently as 1867, Sir Robert Phillimore strongly questioned the policy of the statute, and said that it appeared to him difficult to reconcile the claims of natural justice with the law, which exempted the owner who had a licensed pilot on board from liability for the injuries done by the bad navigation of his vessel to the property of an innocent owner, and observed that no one acquainted with the workings of the law could be ignorant that it was fruitful in injustice. The doctrine that the owners are responsible for the acts of their agents and employees ought not to be discarded, because the selection of a pilot by the owner is limited to those who by the state have been found by examination to possess the requisite knowledge of the

difficulties of local navigation, and the requisite skill to conduct a vessel through them. "As a general rule," says Mr. Justice Grier, in the case of *The Creole*, Dec. Joint Com. 241, "masters of vessels are not expected to be and cannot be acquainted with the rocks and shoals on every coast" (and, we may add, with the currents and shoals of every river), "nor able to conduct a vessel safely into every port. Nor can the absent owners, or their agent the master, be supposed capable of judging of the capacity of persons offering to serve as pilots. They need a servant, but are not in a situation to test or judge of his qualifications, and have not, therefore, the information necessary to choice. The pilot laws kindly interfere, and do that for the owners which they could not do for themselves." And the learned justice observes that in such cases, where a pilot is required to be taken from those licensed, the relation of master and servant is not changed; that the pilot continues the servant of the owners, acting in their employ and receiving wages for services rendered to them, and that the fact that he is selected for them by persons more capable of judging of his qualifications, cannot alter the relation.

And in the case of *The Halley*, Sir Robert Phillimore upon this subject says: "I do not quite understand why, because the state insists, on the one hand, upon all persons who exercise the office of pilot, within certain districts, being duly educated for the purpose, and having a certificate of their fitness, and insists, on the other hand, that the master shall, within these districts, take one of these persons on board to superintend the steering of the vessel, the usual relation of owner and servant is to be entirely at an end; and still less do I see why the sufferer is to be deprived of all practical redress for injuries inflicted upon him by the ship which such a pilot navigates."

By the common law the owners are responsible for the damages committed by their vessel, without any reference to the particular agent by whose negligence the injury was committed. By the maritime law the vessel, as well as the owners, is liable to the party injured for damages caused by its torts. By that law the vessel is deemed to be an offending thing, and may be prosecuted without any reference to the adjustment of responsibility between the owners and employees for the negligence which resulted in the injury. Any departure from this liability of the owners or of the vessel, except as the liability of the former may be released by a surrender of the vessel, has been found in practice to work great injustice. The statute ought to be very clear before we should conclude that any such departure was intended by Congress. The section we have cited would not justify such a conclusion. Its language readily admits of the construction we have given, and that construction is in harmony with the purpose of the act.

We are of opinion that the judgment of the supreme court of Indiana was correct, and it is therefore affirmed.

SUPREME COURT OF MAINE.

(To appear in 65 Me.)

RAILROAD. — NEGLIGENCE. — FENCING TRACK, ETC.

WILDER v. MAINE CENTRAL RAILROAD COMPANY.

The statute requiring railroad corporations to inclose the land taken for their road with fences is a police regulation, designed to secure the safety of the public travel and transportation, and is obligatory, as such, upon all railroad corporations, whether chartered before or after its passage.

A parol agreement between a railroad company and an adjoining owner, for the removal and discontinuance of a fence on the line of the railroad, does not run with the land, and cannot therefore bind his grantee.

Where a horse escaped from his owner's land on to an adjoining railroad and was killed by the railroad company's locomotive; *held*, that the mere fact of his turning his horse upon his land where there was no fence between it and the railroad, when it was the legal duty of the railroad company to build it, was not proof of contributive negligence on his part.

ON EXCEPTIONS AND MOTION. Case for killing the plaintiff's horse at Hallowell, in June, 1871, by running upon him with an engine.

At the trial, March term, 1874, the verdict was for the plaintiff, with damages assessed at \$1,000. The defendants moved to have the verdict set aside as against law and evidence, and filed exceptions.

The plaintiff was a third owner in common of the oil-cloth factory, and the lot connected therewith which extended on both sides of the railroad. The plaintiff's horse escaped from this lot, then unfenced, on to the track at the time of the killing.

There was evidence tending to show that the defendant company originally fenced their track from the oil-cloth lot, and that the fence was removed many years previously at the request of Stickney, a member of the firm of Stickney & Page, owner of the *locus*. The firm afterwards took in Towle as a partner; Stickney died, and the plaintiff purchased his interest in the real estate and mills which were all included in the partnership business.

The defendants contended that they were not bound to fence their road under the general statutes of the state, because their charter and the location of their road were prior to the statute; that they were not bound to fence their road through the plaintiff's lot, because the same was not inclosed or improved land within the meaning of the statute, and because the owners and occupants had agreed with the defendant that they should not fence the same; and that they were not liable because the negligence of the plaintiff caused or contributed to the loss of his horse; and they excepted to such parts of the charge as were adverse to these positions.

The presiding justice, among other things, instructed the jury as follows: —

"The first point made then, in regard to this, is, that the railroad is under no circumstances bound to make a fence, because it is said that the charter of this road was granted previous to the law passed by the legislature, requiring railroads to build fences. I reserve this question for fut-

ure consideration, for the full court, where it can be more carefully examined than it can be here, and hold that this road would be bound by the statute which has been referred to, as having been first passed in 1842. Then under that statute this road and others in the state are bound to build fences along the line of their road on each side, provided they pass through inclosed or improved lands.

"I understand land to be improved, when it is occupied for the purpose of obtaining a profit from the produce which may grow upon it, pasturing, and mowing, or tillage, or anything of that kind. I understand that to be the sense in which the word is used in the law which has been read in your hearing. If it is not improved land, in the sense to which I have called your attention, the road would not be under obligation to build a fence. If it was improved land at that time, in the sense which I have defined to you, then the road would be under obligation, so far as that is concerned.

"I instruct you for the purpose of this trial that the agreement, whatever it was, made with Stickney as a member of that firm, would be binding upon the firm. He had a right, so far as he himself was concerned and so far as the firm then existing was concerned, to release this railroad company from building a fence. He had no such right, to be sure, so far as the public was concerned; and if any passenger had been injured or any property of any person being carried over the road had been injured or destroyed, for the reason that any animal escaped from that and got upon the road, the railroad still might have been liable notwithstanding the agreement.

"The agreement, then, goes no further than to those persons who are parties to it, and who are bound by it; and the party owning the land may assume the obligation, if he chooses, to keep up the fence; and if he does, so far, and so long as that obligation continued, he could have no claim himself upon the railroad for any of his animals that might escape through that fence, or for the want of a fence upon the track.

"So I hold for the purpose of this trial, that a member of the partnership business, in relation to that which pertained to the partnership, would have authority to bind the partnership. If they were then occupying this land, and used it for partnership purposes in carrying on their partnership business, one of the members of the firm would have a legal right, so far as that firm was concerned, to release the company from building the fence. That agreement would continue in force and be binding upon that partnership. It would not be binding, as has been held in our court, upon any successor or any grantees. Now when a partnership is existing, and one partner goes out and another comes in, that is a regular dissolution of that partnership. And a new one being formed, they would be the successors of the others, and, therefore, I instruct you in this case that whatever that contract might have been between Stickney (as representing that partnership) and the railroad company, that would not be binding upon his successors. When the partnership became changed the contract would be no longer in force.

"I instruct you for the purpose of this trial that the mere fact of there being no fence is not proof that he was negligent in turning his horse out there. That is to say, he had a right to use his own land in the ordinary

way, and the railroad company could not screen themselves simply upon the ground that they had neglected to perform the duty which was incumbent upon them. But this principle of law is subject of course to qualifications. In one instance it may not have been a negligent act, and in another instance it may have been a negligent act. Here is a question of fact for the jury to settle. You will take into question the nature of the road, the manner in which it was built, the dump which extended from near the crossing to the bridge, the nature and character of the horse, and all the circumstances bearing upon that, and decide for yourselves whether the plaintiff was guilty of negligence in turning his horse out there under the circumstances in which he did. It is not to be taken as a matter of law that he was negligent, neither are you to consider the simple fact that he turned his horse in, knowing that there was no fence; but you are to take all these circumstances into consideration; you take that of course, so far as it is a fact, that there was no fence there (because if there had been a fence this question would not have arisen), but not as bearing upon the question of negligence; but taking all these circumstances into consideration — was it an act of negligence on his part to turn his horse in?

“If the company was under obligation to build the fence at that time and maintain it, and the plaintiff was not negligent in turning his horse in at that time, the company would be liable. Otherwise, upon this branch of the case, they would not be.”

J. W. Bradbury, Jr., for the defendants. The defendants were not required to fence the *locus in quo*.

I. Their charter, granted in 1836, specially exempts the corporation from the provisions of the Act of March 17, 1831. It is not therefore subject to the future action of the legislature, except in the manner provided in the charter itself; and that does not authorize any action in regard to fencing.

The act requiring railroads to fence was passed in 1842, and the act subjecting them to damages, caused by the neglect, in 1853.

These acts cannot affect the existing relations between this corporation and the land-owner.

As the terms of these relations were established by the charter, they are not to be interfered with by any subsequent legislation.

The legislature, by its own act, had surrendered the power to interfere, and had stipulated that it would not.

It was under this condition that the relations between the land-owner and the corporation had become fixed, and the damages for taking the land appraised and paid.

It was not competent, therefore, for a subsequent legislature to change the conditions or add to the burdens of either party. Any act attempting it would be clearly retroactive and unconstitutional. And the instructions given on this point were therefore erroneous. *Baxter v. Boston & Worcester R. R.* 102 Mass. 383.

II. Again, under the Act of 1842, the relations between the parties were not changed. That act, if constitutional, would only subject the defendants to the penalty for neglect to fence, but it would not authorize the plaintiff to recover in this action, if he could not, independent of its passage.

III. The *locus* was a mill yard, and not inclosed or improved land, such as railroads are required by the statute to fence.

The burden is upon the plaintiff to establish the fact that the defendants were bound to fence. 102 Mass. above cited.

IV. The fence having been removed at the request of, and under an arrangement made with, the managing owner, Mr. Stickney, under whom the plaintiff holds, and whose interest he has, he cannot repudiate that agreement; in fact, he had never done so, and had never intimated to the defendants any desire to have the fence rebuilt. It was an agreement acted upon by the defendants, and it is not competent for the plaintiff to repudiate it without notice. It was competent for Stickney to make such an agreement. *Tombs v. Rochester & Syracuse Railroad*, 18 Barb. 583; *Talmadge v. Rensselaer & Saratoga Railroad*, 18 Barb. 493.

O. D. Baker, with whom was *J. Baker*, for the plaintiff, contended that R. S. c. 51, § 20, applies as well to railroads chartered and located before as after the passage of the statute in 1842, c. 9, § 6. The statute of 1842 does not conflict with the defendants' charter, or the Constitution of the state; for its enactment was in the exercise of a police power, vital to the safety of the public, which the sovereign cannot alienate.

The agreement of the defendants with Mr. Stickney, one of three prior owners, and grantor of the plaintiff, was not binding on the plaintiff.

The agreement was by parol. It was made with only one of three partners, and was never even known to the other two.

I. It has been settled ever since the time of Lord Kenyon, that one partner cannot bind the partnership land even by deed without a special authority, of which there is no pretence here. *Harrison v. Jackson*, 7 T. R. 203.

But if one partner cannot bind partnership land by deed, much less can he by parol. And if he cannot bind the land, how can his agreement run with the land? And if he cannot bind an existing partnership of which he is a member, how can he bind a future partnership of which he is not a member?

II. But whatever the power of partners between each other, a parol contract can never run with the land or affect even the grantees of the person contracting. 1 Smith Lead. Cas. 22; Notes to *Spencer's case*; *Bickford v. Parsons*, 5 C. B. 920.

III. In any view, "an agreement like this for the nullification of a statute of this state cannot be regarded as having any effect upon the rights of any one who is not a party to it nor shown to be cognizant of or assenting to it." It amounts at best only to a personal estoppel. *Gilman v. Eur. & N. A. R. R.* 60 Maine, 235; *Shephard v. Buffalo, &c. R. R.* 35 N. Y. 641; *St. Louis R. R. v. Todd*, 36 Ill. 409.

IV. Every person has a right to "use his own land in a natural and ordinary way for the purposes for which it is fit," and to do so is not negligence; and the mere fact that the plaintiff turned his horse on his own land, knowing it to be unfenced, is not evidence of negligence. *Shear. & Red. on Neg.* § 471; *Shephard v. Buffalo R. R.* 35 N. Y. 641 (overrules the cases in Barb.); *Rogers v. Newburyport R. R.* 1 Allen, 16; *Gardner v. Smith*, 7 Mich. 410, 420; *McCoy v. Cal. Pac. R. R.* 40 Cal. 532; 6 Amr. R. 623; *St. Louis R. R. v. Todd*, 36 Ill. 409.

A. Libbey, in reply. On the point of contributive negligence, he contended that the instructions of the presiding justice did not present the correct rule of law applicable to the case. There was no controversy as to the facts, as to the condition of the road, its situation and manner of construction, the situation of the lot and mill yard, the number of trains and the times they passed the mill, the want of a fence, and the acts of the plaintiff in turning his horse loose. The presiding judge should have held as matter of law, that the facts not disputed did not prove due care on the part of the plaintiff. *Lewis v. B. & O. R. R. Company*, in court of appeals; *W. D.*, reported in *Am. L. Reg.* May, 1874, p. 284, and cases cited in note by *F. R.*; *Eames v. Salem & L. R. R. Co.* 98 Mass. 560; *Gilman v. Deerfield*, 15 Gray, 577.

DICKERSON, J. The statute requiring railroad corporations to inclose the land taken for their road with fences is a police regulation, designed to secure the safety of the public travel and transportation, and is obligatory, as such, upon all railroad corporations whether chartered before or after its passage. *State v. Noyes*, 47 Maine, 189; *Ind. &c. Railway v. Townsend*, 10 Ind. 28; 1 Red. on Railways, 493 and 494; 2 Ib. 428.

The counsel for the defendants contend that the land of the plaintiff adjoining the defendants' road was not "inclosed" or "improved," and was not, therefore, required to be fenced against by the defendants. We think otherwise. Though the land was used partly as a mill yard, it was also mowed, and occasionally used by animals for grazing. The cases cited by the counsel are distinguishable from this case. It appears from them that a railroad company is relieved from the obligation to fence against adjoining lands, when such fence would be a public nuisance, or prevent access to a mill through whose yard the railroad passes, or at points where its engine house, machine shop, car house, wood house, wood shop and depot are so situated as to render a fence unnecessary. These are exceptional cases and do not include the one under consideration.

It is well settled, upon both principle and authority, that a parol agreement for the removal or discontinuance of a fence on the line of a railroad, between the owner of the land and the railroad company, does not run with the land, and cannot, therefore, bind his grantee. *Gilman v. Eur. & N. A. R. R. Co.* 60 Maine, 235; *St. L. & A. R. R. Co. v. Todd*, 36 Ill. 409.

There can be no question, therefore, but the defendants were guilty of negligence in not building a fence upon the line of their road adjoining the plaintiff's land; and the remaining question to be determined is, whether the plaintiff is guilty of contributory negligence in turning his horse out upon his land, knowing that it was not fenced. The owner of land has a right to use it in a natural and ordinary way for the purposes for which it is fit. This right does not depend upon the performance or non-performance of any duty or obligation enjoined by law upon another in respect to his land. He has a right to expect that the requirements of law will be complied with, and to act accordingly; nor does his knowledge that they have not been, affect his right of use one way or the other. If it did, the neglect of another to obey the law might operate to prevent him from the lawful use of his own property. The common law made it the duty of the owner of land to guard against the escape of his

cattle therefrom, but the statute devolves this duty upon the railroad company in the case under consideration, and the rights of the parties must be determined in accordance with this change. To hold the landowner to the same care of his cattle as the common law required, would be to disregard the statute, and render it inoperative. It was for the defendants to use the necessary care to prevent the escape of the plaintiff's horse on account of their neglect to build the fence. *Shear. & Red. on Neg. § 471.*

In *Rogers v. Newburyport R. R. Co.* 1 Allen, p. 17, which was tort for the loss of a colt run over by the defendants' cars, the court say, "the plaintiff had a right to place his colt in his pasture to feed, and was under no obligation to the defendants to use any care to prevent escape by reason of their neglect to maintain the fence. It was for them to use the necessary care to prevent such an escape." *Gardner v. Smith*, 7 Mich. 410.

In *McCoy v. Cal. & Pac. R. R. Co.* 40 Cal. 532, the line of the road was not fenced where it passed through the field occupied by the plaintiff, and the live stock of the plaintiff running in this field strayed on to the road and were killed by the defendants' train; and the court held that these facts made out a *prima facie* case against the defendants, and also, that the plaintiff was not guilty of contributory negligence, from the fact that he knew that the road was not fenced, when he turned his cattle into the field. *Kellogg v. Ch. & N. W. R. R. Co.* 26 Wisc. 223.

The presiding justice stated the rule of law correctly when he instructed the jury that the plaintiff had a right to use his land in the ordinary way, and that the mere fact that the railroad adjoining his land was not fenced, was not proof that he was negligent in turning his horse out there. The question of fact, whether, under all the circumstances of the case, it was negligence in the plaintiff to turn his horse out as he did, was submitted to the jury under appropriate instructions. It was the exclusive province of the jury to determine this question, and they found it in favor of the plaintiff. The jury were aided in their investigation by a plan of the premises, verified and explained by the engineer who drew it. They also saw the witnesses, and could judge of their credibility from their appearance on the stand. It is next to impossible for the court in this class of cases to put itself in the situation of the jury so as to be able to say whether or not its decision would have accorded with theirs if it had occupied their place at the trial. Hence the wisdom of the rule that the court will not set aside a verdict as against evidence or the weight of evidence, unless it is so manifestly so as to render it apparent that the jury had mistaken or disregarded the evidence. In reviewing the testimony in this case, we do not find such ground for setting aside the verdict.

Motion and exceptions overruled. Judgment on the verdict.

APPLETON, C. J., WALTON, BARROWS, and VIRGIN, JJ., concurred.

SUPREME COURT OF THE UNITED STATES.

[OCTOBER, 1876.]

OF THE POWER OF CONGRESS TO CONFER JURISDICTION UPON STATE COURTS. — RIGHT OF ASSIGNEE IN BANKRUPTCY TO SUE IN STATE COURT.

CLAFLIN v. HOUSEMAN, Assignee.

Under the Bankrupt Act of 1867, the assignee might sue in the state courts to recover the assets of the bankrupt, no exclusive jurisdiction being given to the courts of the United States. Whether such exclusive jurisdiction is given by the Revised Statutes, *quere.*

The laws of the United States are as much the law of the land in any state as state laws are; and although, in their enforcement, exclusive jurisdiction may be given to the federal courts, yet where such exclusive jurisdiction is not given, or necessarily implied, the state courts, having competent jurisdiction in other respects, may be resorted to.

In such cases, the state courts do not exercise a new jurisdiction conferred upon them, but their ordinary jurisdiction derived from their constitution under the state law.

MR. JUSTICE BRADLEY delivered the opinion of the court. This action was brought in May, 1872, in the New York supreme court, county of Kings, by Julius Houseman, as assignee in bankruptcy of Comstock and Young, against Horace B. Claflin, under the 35th section of the bankrupt act, to recover the sum of \$1,935.57 (with interest), being the amount collected by Claflin on a judgment against the bankrupts, recovered within four months before the commencement of proceedings in bankruptcy. The ground of the action, as stated in the complaint, was that they (the bankrupts) suffered the judgment to be taken by default, with intent to give Claflin a preference over their other creditors at a time when they were insolvent, and when he knew, or had reasonable cause to believe, that they were insolvent, and that the judgment was obtained in fraud of the bankrupt law. The defendant demurred to the complaint, assigning as cause: first, that the court had no jurisdiction of the subject of the action; secondly, that the complaint did not state facts sufficient to constitute a cause of action. Judgment was rendered for the plaintiff on the 13th day of January, 1873, and was subsequently affirmed, both by the general term of the supreme court and by the court of appeals. This judgment is brought here by a writ of error under the Act of 1867, which supersedes the 25th section of the judiciary act.

The point principally relied on by the plaintiff in error is, that an assignee in bankruptcy cannot sue in the state courts.

It is argued that the cause of action arises purely and solely out of the provisions of an act of Congress, and can only be prosecuted in the courts of the United States, the state courts having no jurisdiction over the subject. It has been recently settled that the several district and circuit courts of the United States have jurisdiction, under the bankrupt law, of causes arising out of proceedings in bankruptcy pending in other districts. There had been much doubt on the subject, but it was finally settled at

the last term of this court in favor of the jurisdiction. *Lathrop v. Drake*, 91 U. S. Rep. 516. Had the decision been otherwise, as for a long period was generally supposed to be the law, assignees in bankruptcy, if the position of plaintiff in error is correct, would have been utterly without remedy to collect the assets of the bankrupt in districts other than that in which the bankruptcy proceedings were pending. Neither the state courts nor the federal courts could have entertained jurisdiction. The Revised Statutes, whether inadvertently or not, have made the jurisdiction of the United States courts exclusive in "all matters and proceedings in bankruptcy." Sec. 711. Whether this regulation will or will not affect the cognizance of plenary actions and suits, it is not necessary now to determine. At all events, the question of such cognizance must be met in this case, and being important in the principles involved, would require much deliberate consideration, had it not been already in effect decided by the court.

In the opinion of the court in *Lathrop v. Drake* it was taken for granted and stated that the state courts had jurisdiction (p. 518); but as the question was not directly involved in that case, it was more fully considered in *Eyster v. Gaff*, 91 U. S. R. 521, and it was there decided that a state court is not deprived of jurisdiction of a case by the bankruptcy of the defendant, but may proceed to judgment without noticing the bankruptcy proceedings if the assignee does not cause his appearance to be entered, or proceed against him if he does appear. If there were anything in the Constitution to incapacitate the state courts from taking cognizance of causes after the bankruptcy of the parties, as the constitutional argument of the plaintiff in error supposes, the proceedings in bankruptcy would *ipso facto* determine them. But on this subject, in *Eyster v. Gaff*, the court say: "It is a mistake to suppose that the bankrupt law avoids, of its own force, all judicial proceedings in the state or other courts the instant one of the parties is adjudged a bankrupt. There is nothing in the act which sanctions such a proposition." Again: "The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions. If it has, for certain classes of actions, conferred a jurisdiction for the benefit of the assignee in the circuit and district courts of the United States, it is concurrent with and does not divest that of the state courts." Pp. 525, 526.

The same conclusion has been reached in other courts, both federal and state, which hold that the state courts have concurrent jurisdiction with the United States courts of actions and suits in which a bankrupt or his assignee is a party. See *Samson v. Burton*, 4 Bank. Reg. 1; *Payson v. Dietz*, 8 Ib. 193; *Gilbert v. Priest*, 8 Ib. 159; *Stevens v. Mechanics' Savings Bank*, 101 Mass. 109; *Cook v. Whipple*, 55 N. Y. 150; *Brown v. Hall*, 7 Bush, 66; *Mays v. Man. Nat. Bank*, 64 Penn. 74. There are contrary cases, it is true, as *Brigham v. Clafin*, 31 Wisc. 607; *Voorhees v. Frisbie*, 25 Mich. 476, and others; but we think that the former cases are founded on the better reason.

The assignee, by the 14th section of the bankrupt act (R. S. sec. 5046),

becomes invested with all the bankrupt's rights of action for property, and actions arising from contract, or the unlawful taking or detention of or injury to property, and a right to sue for the same. The actions which lie in such cases are common law actions, — ejectment, trespass, trover, assumpsit, debt, &c., or suits in equity. Of these actions and suits the state courts have cognizance. Why should not an assignee have power to bring them in those courts as well as other persons? Aliens and foreign corporations may bring them. The assignee simply derives his title through a law of the United States. Should not that title be respected by the state courts?

The case is exactly the same as that of the Bank of the United States. The first bank, chartered in 1791, had capacity given it "to sue and be sued . . . in courts of record, or any other place whatsoever." It was held in *The Bank v. Deveaux*, 5 Cranch, 61, that this did not authorize the bank to sue in the courts of the United States without showing proper citizenship of the parties in different states. The bank was obliged to sue in the state courts. And yet here was a right arising under a law of the United States as much so as can be affirmed of a case of an assignee in bankruptcy. The second bank of the United States had express capacity "to sue and be sued in all state courts having competent jurisdiction, and in any circuit court of the United States." In the case of *Osborn v. The Bank*, 9 Wheaton, 738, 815, it was objected that Congress had not authority to enable the bank to sue in the federal courts merely because of its being created by an act of Congress. But the court held otherwise, and sustained its right to sue therein. No question was made of its right to sue in the state courts.

Under the Bankrupt Law of 1841, with substantially the same provisions on this subject as the present law, it was held that the assignee could sue in the state courts. *Ex parte Christie*, 3 How. 318, 319; *Nugent v. Boyd*, Ib. 426; *Wood v. Jenkins*, 10 Metc. 583.

Other analogous cases have occurred, and the same result has been reached; the general principle being that where jurisdiction may be conferred on the United States courts, it may be made exclusive where not so by the Constitution itself; but if exclusive jurisdiction be neither express nor implied, the state courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it. Thus, the United States itself may sue in the state courts, and often does so. If this may be done, surely, on the principle that the greater includes the less, an officer or corporation created by United States authority may be enabled to sue in such courts. Nothing in the Constitution, fairly considered, forbids it.

The general question, whether state courts can exercise concurrent jurisdiction with the federal courts in cases arising under the Constitution, laws, and treaties of the United States, has been elaborately discussed, both on the bench and in published treatises, — sometimes with a leaning in one direction, and sometimes in the other; but the result of these discussions has, in our judgment, been, as seen in the above cases, to affirm the jurisdiction where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case.

When we consider the structure and true relations of the federal and

state governments, there is really no just foundation for excluding the state courts from all such jurisdiction.

The laws of the United States are laws in the several states, and just as much binding on the citizens and courts thereof as the state laws are. The United States is not a foreign sovereignty as regards the several states; but is a concurrent, and, within its jurisdiction, paramount sovereignty. Every citizen of a state is a subject of two distinct sovereignties having concurrent jurisdiction in the state—concurrent as to place and persons, though distinct as to subject matter. Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either sovereignty, competent to hear and determine such kind of rights, and not restrained by its constitution in the exercise of such jurisdiction. Thus a legal or equitable right, acquired under state laws, may be prosecuted in the state courts, and also, if the parties reside in different states, in the federal courts. So rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States courts, or in the state courts competent to decide rights of the like character and class; subject, however, to this qualification, that where a right arises under a law of the United States, Congress may, if it see fit, give to the federal courts exclusive jurisdiction. See remarks of Mr. Justice Field, in *The Moses Taylor*, 4 Wall. 249, and Story, J., in *Martin v. Hunter's Lessee*, 1 Wheat. 334; and of Mr. Justice Swayne, in *Ex parte McNeil*, 13 Wall. 236. This jurisdiction is sometimes exclusive by express enactment and sometimes by implication.

If an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court. The fact that a state court derives its existence and functions from the state laws, is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the state as it is to recognize the state laws. The two together form one system of jurisprudence which constitutes the law of the land for the state; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country having jurisdiction partly different and partly concurrent. The disposition to regard the laws of the United States as emanating from a foreign jurisdiction is founded on erroneous views of the nature and relations of the state and federal governments. It is often the cause, or the consequence, of an unjustifiable jealousy of the United States government, which has been the occasion of disastrous evils to the country.

It is true, the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as was clearly shown by Chief Justice Taney in the case of *Ableman v. Booth*, 21 How. 506; and hence the state courts have no power to revise the action of the federal courts; nor the federal, the state, except where the federal Constitution or laws are involved. But this is no reason why the state courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied.

A reference to some of the discussions, to which the subject under discussion has given rise, may not be out of place on this occasion.

It was fully examined in the 82d number of the "Federalist," by Alexander Hamilton, with his usual analytical power and far seeing genius; and hardly an argument or a suggestion has been made since which he did not anticipate. After showing that exclusive delegation of authority to the federal government can arise only in one of three ways: either by express grant of exclusive authority over a particular subject; or by a simple grant of authority with a subsequent prohibition thereof to the states; or, lastly, where an authority granted to the Union would be utterly incompatible with a similar authority in the states; he says that these principles may also apply to the judiciary as well as the legislative power. Hence he infers that the state courts will retain the jurisdiction they then had, unless taken away in one of the enumerated modes. But as their previous jurisdiction could not by possibility extend to cases which might grow out of, and be peculiar to the new Constitution, he considered that, as to such cases, Congress might give the federal courts sole jurisdiction. "I hold," says he, "that the state courts will be divested of no part of their primitive jurisdiction, further than may relate to an appeal; and I am even of opinion that in every case in which they were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth. This I infer from the nature of judiciary power, and from the general genius of the system.

"The judicial power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. . . . When, in addition to, this we consider the state governments and the national governments, as they truly are, in the light of kindred systems, and as parts of *one whole*, the inference seems to be conclusive that the state courts would have concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited."

These views seem to have been shared by the first Congress in drawing up the Judiciary Act of September 24th, 1789; for, in distributing jurisdiction among the various courts created by that act, there is a constant exercise of the authority to include or exclude the state courts therefrom; and where no direction is given on the subject, it was assumed, in our early judicial history, that the state courts retained their usual jurisdiction concurrently with the federal courts invested with jurisdiction in like cases.

Thus, by the judiciary act, exclusive cognizance was given to the circuit and district courts of the United States of all crimes and offences cognizable under the authority of the United States, and the same to the district courts, of all civil causes of admiralty and maritime jurisdiction; of all seizures on water under the laws of impost, navigation, or trade of the United States, and of all seizures on land for penalties and forfeitures incurred under said laws. *Ibid.* Concurrent jurisdiction with the state courts was given to the district and circuit courts of all causes where an alien sues for a tort only in violation of the law of nations, or a treaty of the United States; and of all writs at common law where the United States are plaintiffs; the same to the circuit courts, where the suit is

between a citizen of the state where the suit is brought and a citizen of another state, where an alien is a party, &c., &c. Here no distinction is made between those branches of jurisdiction in respect to which the Constitution uses the expression "*all cases*" and those in respect to which the term "all" is omitted. Some have supposed that wherever the Constitution declares that the judicial power shall extend to "all cases," — as all cases in law and equity arising under the Constitution, laws, and treaties of the United States; all cases affecting ambassadors, &c., — the jurisdiction of the federal courts is necessarily exclusive; but that where the power is simply extended "to controversies" of a certain class, — as "controversies to which the United States is a party," &c., — the jurisdiction of the federal courts is not necessarily exclusive.

But no such distinction seems to have been recognized by Congress, as already seen, in the judiciary act. And subsequent acts show the same thing. Thus, the first patent law for securing to inventors their discoveries and inventions, which was passed in 1793, gave treble damages for an infringement, to be recovered in an action on the case founded on the statute in the circuit court of the United States, "or any other court having competent jurisdiction," — meaning, of course, the state courts. The subsequent acts on the same subject were couched in such terms, with regard to the jurisdiction of the circuit courts, as to imply that it was exclusive of the state courts; and now it is expressly made so. See Patent Acts of 1800, 1819, 1836, 1870, and Rev. Stat. U. S. sect. 711; *Parsons v. Barnard*, 7 Johns. 144; *Dudley v. Mayhew*, 3 Comst. 14; *Elmer v. Pennel*, 40 Maine, 484.

So with regard to naturalization, a subject necessarily within the exclusive regulation of Congress, the first act on the subject passed in 1790, and all the subsequent acts, give plenary jurisdiction to the state courts. The language of the Act of 1790 is, "any common law court of record in any one of the states," &c. 1 Stat. 103. The Act of 1802 designates "the supreme, superior, district, or circuit court of some one of the states, or of the territorial districts of the United States, or a circuit or district court of the United States." 2 Stat. 153.

So by acts passed in 1806 and 1808, jurisdiction was given to the county courts along the northern frontier, of suits for fines, penalties, and forfeitures under the revenue laws of the United States. 2 Stat. 354, 489. And by Act of March, 3, 1815, cognizance was given to state and county courts, generally of suits for taxes, duties, fines, penalties, and forfeitures arising under the laws imposing direct taxes and internal duties. 3 Stat. 244.

These instances show the prevalent opinion which existed, that the state courts were competent to have jurisdiction in cases arising wholly under the laws of the United States; and whether they possessed it or not, in a particular case, was a matter of construction of the acts relating thereto. It is true that the state courts have, in certain instances, declined to exercise the jurisdiction conferred upon them; but this does not militate against the weight of the general argument. See *U. S. v. Lathrop*, 17 Johns. 4. See especially the able dissenting opinion of Mr. Justice Platt, *ib.* p. 11.

It was indeed intimated by Mr. Justice Story, *obiter dictum*, in deliver-

ing the opinion of the court in *Martin v. Hunter's Lessee*, 1 Wheat. 334-337, that the state courts could not take *direct* cognizance of cases arising under the Constitution, laws, and treaties of the United States, as no such jurisdiction existed before the Constitution was adopted. This is true as to jurisdiction depending on United States authority; but the same jurisdiction existed (at least to a certain extent) under the authority of the states. Inventors had grants of exclusive right to their inventions before the Constitution was adopted, and the state courts had jurisdiction thereof. The change of authority creating the right did not change the nature of the right itself. The assertion, therefore, that no such jurisdiction previously existed, must be taken with important limitations, and did not have much influence with the court when a proper case arose for its adjudication. *Houston v. Moore*, decided in 1820, 5 Wheat. 1, was such a case. Congress, in 1795, had passed an act for organizing and calling forth the militia, which prescribed the punishment to be inflicted on delinquents, making them liable to pay a certain fine, to be determined and adjudged by a *court-martial*, without specifying what court-martial. The legislature of Pennsylvania also passed a militia law providing for the organization, training, and calling out of the militia, and establishing courts-martial for the trial of delinquents. The law in many respects exactly corresponded with that of the United States, and, as far as it covered the same ground, was for that reason held to be inoperative and void.

Houston, a delinquent under the United States law, was tried by a state court-martial, and it was decided that the court had jurisdiction of the offence, having been constituted, in fact, to enforce the laws of the United States which the state legislature had reenacted. But the decision (which was delivered by Mr. Justice Washington) was based upon the general principle that the state court had jurisdiction of the offence, irrespective of the authority, state or federal, which created it. Not that Congress could confer jurisdiction upon the state courts, but that these courts might exercise jurisdiction on cases authorized by the laws of the state and not prohibited by the exclusive jurisdiction of the federal courts. Justices Story and Johnson dissented; and, perhaps, the court went further in the case than it would now. The act of Congress having instituted courts-martial, as well as provided a complete code for the organization and calling forth of the militia, the entire law of Pennsylvania on the same subject might well have been regarded as void. Be this as it may, it was only a question of construction, and the court conceded that Congress had the power to make the jurisdiction of its own courts exclusive.

In *Cohens v. Virginia*, 6 Wheaton, 415, Chief Justice Marshall demonstrates the necessity of an appellate power in the federal judiciary, to revise the decisions of state courts in cases arising under the Constitution and laws of the United States, in order that the constitutional grant of judicial power, extending it to all such cases, may have full effect. He says: "The propriety of intrusting the construction of the Constitution and laws made in pursuance thereof to the judiciary of the Union, has not, we believe, as yet been drawn in question. It seems to be a corollary from this political axiom, that the federal courts should either pos-

sess exclusive jurisdiction in such cases, or a power to revise the judgment rendered in them by the state tribunals.

"If the federal and state courts have concurrent jurisdiction in all cases arising under the Constitution, laws, and treaties of the United States, and if a case of this description brought in a state court cannot be removed before judgment, nor revised after judgment, then the construction of the Constitution, laws, and treaties of the United States is not confided particularly to their judicial department, but is confided equally to that department and to the state courts, however they may be constituted."

See subject further discussed in 1 Kent's Com. 395, &c.; Sergeant on the Constitution, 268; 2 Story on the Const. sec. 1748, &c.; 1 Curtis's Commentaries, secs. 119, 184, &c.

The case of *Teal v. Felton* was a suit brought in the state court of New York against a postmaster, for neglect of duty to deliver a newspaper under the postal laws of the United States. The action was sustained by both the supreme court and court of appeals of New York, and their decision was affirmed by this court. 1 Comstock, 587; 12 How. 292. We do not see why this case is not decisive of the very question under consideration.

Without discussing the subject further, it is sufficient to say, that we hold that the assignee in bankruptcy, under the Bankrupt Act of 1867, as it stood before the revision, had authority to bring a suit in the state courts, wherever those courts were invested with appropriate jurisdiction, suited to the nature of the case.

The judgment is affirmed.

SUPREME COURT COMMISSION OF OHIO.

(To appear in 27 Ohio St.)

BILLS AND NOTES.—EVIDENCE OF FRAUD IN TAKING PAPER AS OPENING ANTECEDENT DEFENCES.

JOHNSON v. WAY.

A holder of negotiable paper, who takes it before maturity for a valuable consideration, in the usual course of trade, without knowledge of facts which impeach its validity between antecedent parties, holds it by a good title; but circumstances tending to show bad faith or fraud in taking such paper are admissible in evidence, and the establishment of such bad faith or fraud, whether by direct or circumstantial evidence, subjects the holder of paper so taken to defences existing between antecedent parties.

ERROR to the district court of Portage County.

The plaintiff brought suit in the court of common pleas of Portage County to recover of the defendant the amount of two promissory notes of seventy-five dollars each, of which the following is a copy:—

"POST-OFFICE ADDRESS, SUFFIELD, COUNTY OF PORTAGE,
State of Ohio, July 29, 1869.

"Three months after date, I promise to pay to the order of L. A. Wilder seventy-five dollars, for value received, with use.

[Stamp.] "SOLOMON WAY."

"Indorsed: I hereby certify that I am worth \$8,000, consisting of personal property to the amount of \$1,000 and one hundred and seventeen acres of land. I make this statement for the purpose of obtaining credit.

"SOLOMON WAY."

"Indorsed, without recourse, to L. A. Wilder."

The second note is like the first, except due in *four* months after date.

On the trial, the plaintiff admitted that the notes were given for a worthless patent right metallic roofing cement, and were without consideration, as between the original parties.

The proof shows that one Lewis D. Joy bought the notes before maturity; that Joy paid \$100 cash for each \$150 of notes, and received them indorsed "without recourse;" that the plaintiff bought the notes of Joy before maturity, and paid the face thereof in coal stock of the Trumbull Coal Company (an incorporated mining company), at fifty cents on the dollar of its par value; that the coal stock was delivered to Joy, and the notes to Johnson before they matured, and without any actual notice of any defence.

On the trial the plaintiff asked the court to charge the jury as follows:—

"1. Suspicion of defect of title, or fraudulent inception, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, will not defeat his title; that result can be produced only by *bad faith* on his part; mere want of caution and care is not enough.

"2. In brief, did the plaintiff or Joy buy the notes in good faith and without fraud, for value, before due? If so, and without notice of any defect, plaintiff is entitled to recover. It is a question of good faith and fraud, and not of carelessness or negligence on the part of plaintiff or Joy, unless it amounts to fraud or want of good faith.

"3. That the law presumes *prima facie* in favor of every holder of negotiable paper, that, 1st. He is the owner of it; 2d. That he took it for value; 3d. Before due; 4th. In the regular course of trade; and plaintiff is entitled to recover, unless these presumptions of law are overcome by proof in the case."

The court refused to charge as requested, but charged the jury upon the point in question as follows:—

"If the proof shows that both Johnson and Joy took these notes with notice of their infirmities, then plaintiff ought not to recover, and upon this proposition the burden of proof rests upon the defendant.

"To constitute a sufficient notice, it is not essential that the party should have had actual positive notice of the defects of the notes, but if the circumstances and facts connected with, and surrounding the transfer, whether they appeared upon the notes themselves, or outside of them, were of such strong and pointed character as to put the purchaser on in-

quiry, then the law presumes that he did make those inquiries, or that if he did not he should bear the responsibility in the same manner as if he had made them, and they had led him to a full knowledge of the whole truth connected with giving the notes. The purchaser was not bound to make inquiries, unless there was something in the circumstances of the case that would have put an ordinarily careful and prudent man upon investigation. But while the purchaser was not bound to make inquiries from motives of mere curiosity and suspicion, yet he was not at liberty to shut his eyes to facts and circumstances that presented themselves to him, if those facts and circumstances would have attracted the attention of a man of common prudence. It was not enough if the facts and circumstances were merely sufficient to suggest inquiry by the most cautious; nor does the law require circumstances so startling as to awaken investigation on the part of the most dull and stolid. But if the defendant has shown you by testimony, to your satisfaction, that Joy and Johnson had actual notice at the time of the purchase of the notes of their defects and infirmities, or if they had such knowledge of facts and circumstances as to put a reasonable and prudent man upon inquiry, then the plaintiff cannot recover."

To the refusal of the court to charge as requested, and to the charge as given, the plaintiff excepted. Judgment was rendered for the defendant, and on petition in error the judgment of the common pleas was affirmed by the district court. It is now sought to reverse the judgments of the courts below, for error in the charge given to the jury on the trial in the court of common pleas.

M. Stewart, for plaintiff in error. The court erred in its charge, which was, in substance, that "the plaintiff, having admitted that the notes were without consideration between the original parties, he is not entitled to recover, unless he proves (independent of any presumption of law) that he bought them before due, and paid value in the regular course of trade." 1 Parsons on Notes & Bills, 185; *Swift v. Tyson*, 16 Pet. 16; *Nixon v. De Wolf*, 10 Gray, 348; *Dumont v. Williamson*, 18 Ohio St. 115; *Davis v. Bartlett*, 12 Ib. 544. And as to notice, *Goodman v. Simons*, 20 How. 365; *Andrews v. Pond*, 13 Pet. 65; *Fowler v. Brantly*, 14 Ib. 318; *Bank of Pittsburg v. Neal*, 22 How. 108; 2 Parsons on Con. 3, 4.

The indorsement furnished no evidence or ground of suspicion to put plaintiff on inquiry. *Russell v. Ball*, 2 Johns. 50; *Goddard v. Lyman*, 14 Pick. 268; *Bisbing v. Graham*, 14 P. S. 14; *Epler v. Funk*, 8 Barr, 468.

The purchaser of commercial paper before due, in good faith, for value, in the regular course of trade, holds it discharged of all prior equities. Circumstances of suspicion that would attract the attention of a man of common prudence, or even carelessness or gross negligence on his part, at the time of the purchase, will not defeat his title. That can only be effected by actual notice, or fraud on his part. *Murray v. Lardner*, 2 Wall. 121; *Goodman v. Harvey*, 4 Adol. & Ellis, 470.

The rule in England originally, for a long period, protected the holder against the fraud of antecedent parties, unless he was shown to have had actual notice, or was guilty of bad faith. It was first announced by Lord

Mansfield, in 1758, in *Miller v. Race*, 1 Bur. King's Bench Rep. 452, and was reaffirmed by the same judge in *Grant v. Vaughn*, 3 Bur. 15, 16. In 1764, and through all the long period following it, not only in that, but the various other courts of that country, it remained the unquestionable law of the land down to 1824, when *Gill v. Cubit*, 3 Barn. & Cress. 466, changed the rule, and made the holder chargeable with knowledge, if the circumstances were such as ought to have excited the suspicions of a person of reasonable care and prudence. In 1834, in *Crooks v. Jadis*, 5 Barn. & Ad. 909, the court of king's bench again changed the law, and held that the owner should be protected unless guilty of gross negligence in the purchase. But in 1836, the law having been found not only unsatisfactory to commerce, but to the courts themselves, as being too variant and changeable, and depending upon the intelligence and capacity not only of the purchaser, but even of the jury who might try the question, that same court, in *Goodman v. Harvey*, rising above the erroneous precedents of the cases commencing with *Gill v. Cubit*, and seeming to appreciate the increased and constantly increasing requirements of the business interests of the country and of trade, brushed away the uncertainty and changeableness attendant on the application of the rule, as held in *Gill v. Cubit* and *Crooks v. Jadis*, and returned to the original doctrine of *Miller v. Race*, which has ever since been the settled law of that country, affirmed by numerous decisions since then, so repeatedly and decidedly that no late jurist or elementary writer is found to dispute the proposition, "that nothing short of actual notice, or bad faith (fraud), will defeat the title of the holder." *Raphael v. Bank of England*, 84 English Com. Law, 161; *Carlton v. Ireland*, 85 Com. Law, 765.

For the law, as declared in this country: *Swift v. Tyson*, 16 Pet. 15; *Goodman v. Simons*, 20 How. 343; *Bank of Pittsburg v. Neal*, 22 Ib. 108; *Murrag v. Lardner*, 2 Wall. 110; *Edwards on Bills & Notes*, 318; *Uther v. Rich*, 10 Adol. & Ellis, 784; *Steinbacker v. Boker*, 34 Barb. 436; *Magee v. Badger*, 34 N. Y. 247; *Belmont Bank v. Hodge*, 35 Ib. 65; *Brush v. Scribner*, 11 Conn. 388; 10 Cush. 488; 4 Ga. 287; 13 Ala. 390.

S. P. Woolcott, for defendant in error.

DAY, J. The questions made in the case relate to the rights of indorsees of negotiable paper, and arise upon the charge of the court to the jury. Though other questions are made in argument, we do not deem it important to notice here but one of the grounds of exception.

The court charged the jury, that as the notes were conceded to be invalid as between the original parties, the plaintiff, though an indorsee of the notes for value before due, could not recover, if he had such knowledge of facts and circumstances as to put an ordinarily careful and prudent man upon inquiry as to the infirmities of the notes. The question, then, is, whether this rule is to be applied to a holder of negotiable paper, to whom it is indorsed in the usual course of trade, for value before due.

It was early the settled law in England, in regard to paper drawn in a form to pass from hand to hand in the course of business and trade, that the holder, who came by it fairly and honestly before due, for a valuable consideration, had a good title. *Salk.* 126; *Miller v. Race*, 1 Bur. 452; *Peacock v. Rhodes*, Doug. 633; *Lawson v. Weston*, 4 Esp. 26; *Gorgier v. Mieville*, 3 Barn. & Cress. 45.

In 1824, in *Gill v. Cubit*, 3 Barn. & Cress. 466, the court of king's bench added a new limitation to the title of the holder of negotiable paper, and held that he acquires no title as against the equities of antecedent parties, if he takes it under circumstances which would excite the suspicions of a prudent and careful man. This rule was followed for a number of years in England, and by many of the courts of this country.

But in 1834, in *Crook v. Jadis*, 5 Barn. & Ad. 909, this rule was so far shaken that an indorsee of a bill of exchange was permitted to recover against the drawer, unless he proved that the indorsee was guilty of gross negligence in taking the bill; and two years later, in *Goodman v. Harvey*, 4 Ad. & El. 870, it was decided that gross negligence is not alone enough to destroy the title of a holder for value, but that a case of bad faith in taking the security must be made against him, in order to defeat his claim.

Since 1836, the rule established in *Goodman v. Harvey* has been followed by the British courts, and may now be regarded as the settled law of that country. *Raphael v. The Bank of England*, 17 C. B. (84 E. C. L.) 161.

Although the rule declared in *Gill v. Cubit* has been followed by many of the courts of this country, it has been so generally repudiated by the more modern decisions, and that of *Goodman v. Harvey* approved, that the doctrine of the case may now be regarded to be the American, as well as English law upon the subject. *Worcester County Bank v. Dorchester & Milton Bank*, 10 Cush. 488; *Smith v. Livingston*, 111 Mass. 342; *Mathews v. Poythress*, 4 Geo. 287; *Miller v. Finley*, 26 Mich. 249; *Phelan v. Moss*, 67 Penn. St. 59; *Magee v. Badger*, 34 N. Y. 247; *Belmont Bank v. Hoge*, 85 N. Y. 65; *Goodman v. Simonds*, 20 How. 343; *Murray v. Lardner*, 2 Wall. 110; *Hotchkiss v. National Bank*, 21 Wall. 354; 1 Smith's Lead. Cas. (7th Am. ed.) 825; Redfield & Bigelow's Lead. Cas. on Bills & Notes, 257.

In the case of *The Belmont Bank v. Hoge*, *supra*, the view of the New York court of appeals upon the question is stated as follows: "One who, for full value, obtains from the apparent owner a transfer of negotiable paper before it matures, and who has no notice of any equities between the original parties, or of any defects in the title of the presumptive owner, is to be deemed a *bona fide* holder. He does not owe to the party who puts such paper in circulation the duty of active inquiry, to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by mere speculation as to his probable diligence or negligence."

In *Smith v. Livingston*, 111 Mass. 345, the court disapprove the rule of *Gill v. Cubit*, and say: "Circumstances which might excite the suspicions of one man might not attract the attention of another. It is a rule which business men cannot act upon in the ordinary affairs of life with any certainty that they are safe."

In *Murray v. Lardner*, *supra*, the law in regard to negotiable paper, as settled by the supreme court of the United States, is summarized as follows: "The party who takes it before due for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title valid against all the world. Suspicions of defect of title, or the

knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part. . . . The rule may perhaps be said to resolve itself into a question of honesty or dishonesty, for guilty knowledge and wilful ignorance alike involve the result of bad faith."

It was, moreover, settled in that case, that circumstances tending to show bad faith or fraud in taking such paper, though not conclusive in themselves, are admissible in evidence, and the establishment of bad faith or fraud, whether by direct or circumstantial evidence, is fatal to the title of the party so taking it.

The rule established in these cases neither restricts the usefulness of paper made to pass from hand to hand in commerce, nor does it relieve the party taking it from the obligations of good faith. This rule may be more readily applied than that laid down in *Gill v. Cubit*, for a rule based on good faith as a standard is more easily comprehended than one grounded upon speculations as to what ought to excite the suspicions of a prudent man. A prudent man, it has been well said, may be more or less suspicious under similar circumstances at one time than at another, and may also suspect where another equally prudent would not; and the standard of the jury may be higher or lower than that of other men who are prudent in the management of their affairs.

The point in controversy has not been directly determined by the supreme court of this state. The rules laid down in *Davis v. Bartlett*, 12 Ohio St. 534, which are stated in the syllabus, are, however, in harmony with that of *Goodman v. Harvey*; so is the decision in *Bassett v. Avery*, 15 Ohio St. 299, as well as the principle upon which the case was decided. But a remark upon a hypothetical case stated in the opinion delivered in *Bassett v. Avery* warrants the charge to the jury complained of in this case. Speaking of what might constitute a defence against an indorsee of a negotiable note, it is said: "If such circumstances of suspicion had been shown to exist as ought to have put Bassett upon inquiry before purchasing, he would be presumed to have either made the inquiry and ascertained the truth, or have been guilty of a degree of negligence equally fatal to his claim to be considered a *bond fide* purchaser." This statement is made upon the authority of *Williamson v. Brown*, 15 N. Y. 354; but that case did not relate to negotiable paper; and we have seen, moreover, that a different rule now obtains in New York in reference to that kind of instruments.

In *McKesson v. Stanbury*, 3 Ohio St. 156, it was only necessary to determine upon which party the burden of proof rested, and the case, as explained, and upon the principles settled in *Davis v. Bartlett*, was decided right. The statement in the opinion in regard to the prudence required of an indorsee of negotiable paper was unnecessary to the decision of the case, and like that of a similar character in *Bassett v. Avery*, may be regarded only as a *dictum*. Without questioning the correctness of the decisive points of these cases, we do not feel bound to follow the *dicta* referred to. Although entitled to great weight as the utterances of able judges, and warranted by a line of decisions, they were, however, only incidental remarks in the cases in which they were made, and are not in

accordance with the rule as now settled by repeated decisions of the highest courts of England and America.

Guided by the leading authorities of both countries, we are brought to the following conclusions : —

A holder of negotiable paper, who takes it before maturity for a valuable consideration, in the usual course of trade, without knowledge of facts which impeach its validity between antecedent parties, holds it by a good title.

To defeat his recovery thereon, it is not sufficient to show that he took it under circumstances that ought to excite suspicions in the mind of a prudent man.

To have that effect, it must be shown that he took the paper under circumstances showing bad faith or want of honesty on his part.

Circumstances tending to show bad faith or fraud in taking such paper, though not conclusive in themselves, are admissible in evidence ; and the establishment of such bad faith or fraud, whether by direct or circumstantial evidence, subjects the holder of paper so taken to defences existing between antecedent parties.

Judgment accordingly.

SCOTT, C. J., WRIGHT, JOHNSON, and ASHBURN, JJ., concurred.

SUPREME COURT OF MAINE.

(To appear in 65 Maine.)

CONTRACT TO DELIVER WHEAT AT FUTURE DATE BASED ON "MARGIN" NOT A WAGERING CONTRACT.

RUMSEY v. BERRY.

A contract for the sale and purchase of wheat to be delivered in good faith at a future time is not void as a "wagering contract ;" but when under such an agreement it is understood by the parties that no wheat is to be delivered, but only a payment at the time appointed of the difference between the contract and the market price, it thus becomes a wagering contract and the law will not enforce it.

The plaintiffs in good faith, at the request and for the benefit of the defendant, made an agreement for the sale of wheat to be delivered within a certain time, at the option of the defendant, he to furnish sufficient "margin" to secure them against loss. The defendant failed to comply with his part of the contract, and a loss ensued. *Held*, that under such a contract the law will give to the plaintiffs a remedy for their loss.

ASSUMPSIT. The writ was dated August 4, 1872, and contained a count upon an account annexed, and one for money paid, laid out, and expended. The action was brought to recover a balance alleged to be due from the defendant to the plaintiffs, under the following facts admitted or proved at the trial.

The defendant, a resident of Bangor, Maine, was in Chicago, Illinois, and there met the plaintiffs, who are and were in 1872, when the transactions took place, commission merchants, brokers, and members of the board of trade in Chicago, and authorized the plaintiffs, either personally

or by his agent, April 22, 1872, to sell for him, 10,000 bushels of wheat at \$1.30 and \$1.31 per bushel, to be delivered at any time he (Berry) pleased during the month of May following. The plaintiffs thereupon did, in their own name, according to said orders, contract to deliver said wheat to third parties. By custom and law at Chicago, so long as the defendant furnished to the plaintiffs sufficient "margin" so called, to secure them against loss in the event of a rise in the price of wheat, the plaintiffs must carry said contract along open under the directions of the defendant, until the last day of May; but if upon demand for additional margins upon the rise in the price of wheat, said "margins" were not furnished within a reasonable time, then the plaintiffs had a right at any time to purchase in wheat at the market price, to fill said contract, or to settle on the best terms possible with the parties to whom they had contracted to deliver the wheat, and claim of the defendant reimbursement for any loss incurred. Soon after April 22d, wheat commenced to rise in price, and upon demand, the defendant furnished \$700 as a "margin;" but wheat continued to advance in price, and upon demand for further "margin," the defendant failed to furnish it, and the contract was cancelled by the plaintiffs with the parties with whom they had contracted to deliver, in one or the other of the months above described, at a loss of about \$3,000, only \$700 of which was covered by the margin deposited; and this suit was to recover the difference, and the verdict of the jury was the full amount claimed. The defendant testified at the trial, that at the time the plaintiffs and the defendant entered into this contract the defendant had no wheat, and that the plaintiffs knew it; but it was proved at the trial and admitted by the defendant, that in pursuance of the agreement of the plaintiffs to sell wheat for the defendant, that the plaintiffs did contract with certain persons in Chicago, and become personally responsible to deliver them 5,000 bushels of wheat at \$1.31, and 5,000 bushels at \$1.30 per bushel, on some day in May, at seller's option, and that they did either actually deliver the wheat or make satisfactory settlement with the parties, at a loss of about \$3,000; hence the defendant claimed at the trial, and his counsel asked the presiding judge to instruct the jury, that said contract was merely betting upon the price of wheat during the balance of the month of April and the month of May, and therefore a "wagering contract," and therefore illegal and invalid as a foundation of the action. This instruction the presiding justice refused to give; but did instruct the jury that such a contract would be valid under the laws of this state, and, in the absence of proof to the contrary, would be presumed to be valid under the laws of Illinois, where the contract was made.

The verdict was for the plaintiffs for \$2,305.62.

The defendant alleged exceptions.

J. F. Godfrey, for the plaintiffs.

F. A. Wilson & C. F. Woodard, for the defendant.

DANFORTH, J. The plaintiffs are, and were in 1872, brokers, commission merchants, and members of the board of trade in Chicago, and, at the request and for the benefit of the defendant, a resident of Bangor, contracted with third parties for the sale of a quantity of wheat.

This contract was entered into upon the 22d day of April, 1872, and

the delivery was to be at the option of the defendant, at any time during the month of May following. The plaintiffs were personally responsible for the performance of this agreement, and the defendant was on his part under obligation to furnish sufficient "margin" to secure against loss in case of a rise in wheat. This he failed to do; a considerable loss followed, and this action was commenced to recover the amount of it.

The liability of the defendant by the terms of the contract is not denied, but the presiding justice was requested "to instruct the jury, that said contract was merely betting upon the price of wheat during the balance of the month of April and the month of May, and therefore a 'wagering contract,' and therefore illegal and invalid as a foundation of the action." This instruction was refused, and the jury were instructed that the contract was valid under the laws of this state, and, in the absence of proof to the contrary, would be presumed to be valid under the laws of Illinois, where it was made.

No question is here raised as to whether any fact in relation to the nature of the contract and proper for the consideration of the jury was taken from them. The request was not for instructions as to the nature and effect of a wagering contract, but that as a matter of law this was such. As the agreement was not in writing, it might have been proper for the presiding justice, had he been so requested, to have defined a wagering contract, and have left it to the jury to find whether by a fair inference from all the testimony this was within the definition. But virtually the request was that the court should decide the question as a matter of law. This was done, and nothing is now presented but simply to ascertain whether the case shows any error in that decision.

Such error we fail to discover. The testimony, so far as reported, reveals nothing inconsistent with an ordinary sale of an article to be delivered in the future. While it may indeed appear a little singular and even suspicious that a man residing in Bangor, having no wheat of his own, should undertake to sell and deliver wheat in Chicago; still we cannot assume that any one has violated the law and been guilty of immoral and corrupting practices in his business transactions, without proof, even though he may ask it himself, for the purpose of being relieved from the obligation of a losing contract.

Besides we utterly fail to discover any wrong on the part of the plaintiffs. Their business was a legitimate one, and, so far as appears, their connection with this transaction honest. Their profits were not to be affected by the result; their commissions were not to be increased or diminished by any contingency. It is true they were aware that the defendant at the time had no wheat. But the fact itself being immaterial, their knowledge of it is equally so. It is not only common, but perfectly legal and sometimes necessary, to contract for the sale and future delivery of an article which at the time has no existence, but which is afterwards to be purchased, raised, or manufactured.

It does not appear that the defendant had any intention beyond what appears upon the face of the contract, or if he had, that the plaintiffs were cognizant of it. The mischief and illegality arises when the apparent contract is not the real one, when it is a mere cover for ulterior designs, and such as are not authorized by law. A contract for the sale and purchase

of wheat, to be delivered in good faith at a future time, is one thing, and is not inconsistent with the law. But such a contract entered into without an intention of having any wheat pass from one party to the other, but with an understanding that at the appointed time the purchaser is merely to receive or pay the difference between the contract and the market price, is another thing, and such as the law will not sustain. This is what is called a settling of the differences, and as such is clearly and only a betting upon the price of wheat, against public policy, and not only void, but deserving of the severest censure. This distinction is recognized in the *Case of Chandler*, reported in The American Law Register for May, 1874, and the Chicago Legal News of April 11, 1874, relied upon by the defendant. That case, both in the reasoning and conclusion reached, has our entire approbation, and were the facts in the case at bar the same as developed in that, we should not hesitate to apply the same principles of law.

The result is, that whatever might be the conclusion properly reached from the facts applicable to the defendant alone, the case fails to show, on the part of the plaintiffs, any complicity with a wagering or illegal contract.

Exceptions overruled.

APPLETON, C. J., WALTON and VIRGIN, JJ., concurred.

PETERS, J., did not sit.

BARROWS, J., delivered the following dissenting opinion: —

I cannot help thinking that the opinion fails to apply the sound legal doctrine which it affirms to the facts and rulings in the case. The case finds that the plaintiffs knew that the defendant, a citizen of Bangor, had no wheat to sell, but at his request bound themselves by contract, for him, to deliver 10,000 bushels during the next month at the seller's option, at a certain price; that defendant furnished plaintiffs with \$700 as a "margin," but failing, though requested, to make further advances, as the price of wheat rose, they, in accordance with the custom in Chicago, cancelled the contracts at a loss of about \$3,000, and brought this action to recover the difference between that sum and the \$700 margin deposited.

If there was not enough in this to justify the defendant's request, that the presiding judge would rule as matter of law that this was a wagering contract, and illegal and void, still it seems to me very clear that its character was so suspicious that it ought to have been left to the jury, under proper instructions, to say what the true intent of the parties was. Instead of doing this, the presiding judge cut off the defence by a peremptory ruling that under such circumstances the contract would be valid.

It is futile and evasive to argue that this ruling was justified, because, upon its face, the contract was a lawful one for the delivery of wheat at a future day. If it were designed and understood to be a mere gambling transaction, its terms would still be the same.

The real question was, whether it was the intent and expectation of these parties that the wheat should be delivered, or whether it was that, in case of a rise, a settlement was to be made upon such terms as they could get, and in case of a fall, they were to receive the difference from the parties with whom the contract was made.

Nor do I think it can be rightly said that "no question is here raised

as to whether any fact in relation to the nature of the contract, and proper for the consideration of the jury, was taken from them."

The defendant excepted to the instruction given, as well as to the refusal to instruct. I think his exceptions should be sustained. I do not understand that the party who knowingly furnishes one with money to be used at the gambling board is any more entitled to the aid of the court to recover it, than the winning gambler would be to enforce the wager.

DICKERSON, J., concurred in this dissenting opinion.

CUTTING, J., was "inclined to concur in this."

SUPREME COURT COMMISSION OF OHIO.

(To appear in 37 Ohio St.)

REMOVAL OF PROHIBITED BUILDING WITHIN "FIRE LIMITS" OF CITY. — DAMAGES. — CONTRACT, ETC.

CITY OF CLEVELAND v. LENZE.

1. The owner of a wooden building, situated in a city which has, by ordinance, prohibited the erection or placing a wooden structure over ten feet high within certain prescribed boundaries, which building was erected within said limits prior to the passage of the ordinance, may lawfully move such building from one lot to another within the prescribed boundaries.
2. The owner of such building having, by the consent of the city, moved it along and upon a street to a point adjoining his lot, located within the fire boundaries, may lawfully place it upon such lot, and the city could not lawfully interfere to prevent his doing so.
3. Under circumstances that place the city in the wrong, an interference on her part so that the owner is prevented from placing the building on his lot, and in consequence, by obstructing the street, the building becomes a nuisance and is torn down, the city is liable to the owner for damages.
4. Where the building was lawfully in the street, and the owner was in the act of removing it from the street upon his own premises, and by the wrongful interference of the city with the rights of the owner, the building becomes a nuisance, an order from the police court, requiring it to be removed or torn down, will not exempt the city from liability for damages.
5. An agreement between the owner of such building and the city authority, made on the consideration that the city will permit him to tear down his own building, or that the city may tear it down without incurring a responsibility in damages, is wanting in mutuality, without consideration, and void.
6. The owner of such building having offered to make it conform in all respects to the requirements of the fire ordinance of May 10, 1854, had the right to do so, and was entitled to a reasonable time in which to perform.

ERROR to the district court of Cuyahoga County.

William C. Bunts, city solicitor, for plaintiff in error.

John J. Carran & John M. Connell, for defendant in error.

ASHBURN, J. Kasper Lenze prosecutes this action for damages; alleges that he was the owner of a certain building; that defendant caused it to be torn down; that, desiring to remove his building from the

corner of Frankfort and Seneca streets to the corner of St. Clair and Seneca, he procured a permit from defendant to do so; that whilst in the act of removing it the defendant stopped him and wrongfully and with force tore down his building; and claims that he was damaged in the following particulars: That "the defendant wrongfully and unlawfully, and with force and violence, tore down and destroyed said building, and the same became and was wholly lost to said plaintiff; whereby said plaintiff was damaged in the sum of \$8,000 for the loss thereof. And the said plaintiff says he was further damaged by the said defendant, on account of the loss of said building in the preparing said building to be removed, material, labor, and moving, in the sum of \$823. And the said plaintiff says he was further damaged by said defendant by its destruction of said building, in the expense he sustained for the wages of watchmen, lights, lamps, &c., during the time of moving same, to the amount of \$60. And the said plaintiff says that he was further damaged by said defendant, on account of the cost and expense which defendant wrongfully forced plaintiff to pay for tearing down said building, amounting to the sum of \$419. Said plaintiff says he was further damaged by defendant, in the loss and destruction of gas-pipe in said building, in the sum of \$200. Said plaintiff says he was further damaged by said defendant (was forced) removing lumber, rubbish, &c., from the street where the building was torn down, in the sum of \$774. Said plaintiff further says that he sustained further damage by the wrongful and unlawful destruction of said building, in the loss of rents, which he was then in the receipt of, and which thereby became and was lost to said plaintiff, in the sum of \$2,700."

Defendant answered, denying specially the material allegations in the petition, and alleges the building was not moved in pursuance of a permit granted to him; that the city granted a permit to Ingham & Treat to move this building and four others through Seneca and St. Clair streets; that they were to be taken beyond or east of Erie Street on St. Clair Street; that the building was moved into Seneca Street, in pursuance of this permission to Ingham & Treat; that when the building was standing in and obstructing the travel on Seneca Street, the plaintiff agreed to take down and remove the building; and if he failed to do so, then the defendant and its agents or servants should be authorized to tear down and remove the building; that plaintiff failed to do as he agreed, and the defendant notified him, and also Ingham & Treat, to remove the building in six days, or defendant would take the necessary steps to do so; that plaintiff still neglecting to remove the building from the street, legal proceedings were commenced against him, under one of the city ordinances, for obstructing a public street; that he was adjudged guilty, fined, and an order made by the police court, ordering the captain and acting superintendent of the metropolitan force of the city to forthwith remove or tear down said building then obstructing Seneca Street; that the building was torn down, in pursuance of this order of the court, and the material placed on his lot, &c.: denies specially all damages.

The plaintiff put in a reply, admitting some of the allegations in the answer — denying others; sets up some new matter, but nothing that is necessary to state in order to have an understanding of the case.

A final trial in the common pleas resulted in a verdict in favor of the

defendant. Motion for new trial heard and overruled. A bill of exceptions, embodying all the testimony, filed in the case. Petition in error, prosecuted in the district court, resulted in the reversal of the judgment of the court of common pleas. To reverse this judgment of the district court a petition in error was filed in the supreme court. Errors assigned here:—

“I. That said court erred in holding that there was no violation of the ordinance to prevent the erection and placing of wooden buildings in designated territory within the city of Cleveland, passed by the city council of said city, on the 10th day of May, A. D. 1854, to change the location of a wooden building, which was already standing within said limits, from one point to another.

“II. That said court erred in holding that the court of common pleas of Cuyahoga County erred in refusing to instruct the jury that the city was bound to give a reasonable time to make this building to comply with the ordinance of May 10, 1854, said right to be exercised by the plaintiff below in a careful and prudent manner.

“III. That said court erred in holding that the court of common pleas of Cuyahoga County erred in refusing to instruct the jury that if they should be of opinion that this building was wrongfully on the street opposite the corner lot leased of Bolton, then, and in that event, there was no practical way of saving the building, except by putting it on this lot, the city had no right to tear down this building, without giving the plaintiff a reasonable chance to comply with the fire ordinance, by removing it upon this lot, and to so construct the walls and roof of this building as to comply with the ordinance of the city.

“IV. That said court erred in holding that the court of common pleas of Cuyahoga County erred in charging the jury that the city had the right to rescind the permit which had been given to move the building to this lot, and, having done so, had the right to proceed under the ordinance of May 10th, 1854, to prevent the plaintiff from putting the building in question upon the lot on the corner of Seneca and St. Clair streets.

“V. That said court erred in holding that said plaintiff wrongfully prohibited said defendant from placing his wooden building on the lot leased of Judge Bolton.

“VI. That said court erred in holding that said defendant ought to recover damages from said plaintiff, if any were sustained by said defendant by reason of having his building torn down by an order of the police court of the city of Cleveland, while standing on the street in front of said leased lot.

“VII. That said court erred in reversing the judgment obtained by said plaintiff against said defendant in the court of common pleas of Cuyahoga County.

“VIII. That said judgment in the district court was given for the said defendant, Kasper Lenze, when it ought to have been given for the said plaintiff, the city of Cleveland, according to the law of the land.”

The rulings of this court, upon the questions involved in this assignment of errors, appear with sufficient distinctness in the opinion.

It appears in the testimony that, in 1854, the city council of Cleveland provided by ordinance that no person should erect or place any building,

or any addition to any building, more than ten feet high, within the city limits "bounded on the north by St. Clair Street, on the east by Ontario Street, on the south by Superior Street, and on the west by Water Street, unless the outer walls thereof be made of brick and mortar, or of iron, or of stone and mortar, with paring walls rising at least ten inches above the roof, and the roof or cornice thereof be made or covered with some fire-proof material."

To secure obedience to the requirements of the ordinance a severe pecuniary penalty was provided, to be collected by trial and conviction in the police court. This territory was known as the "fire limit," and the ordinance as the "fire ordinance."

In another ordinance, it was provided "that no person shall place, or cause to be placed, occupy, or permit to be occupied, a building or structure of any kind, upon any public ground, street, lane, or alley, now or heretofore established and laid out."

A person violating this provision was to be notified by the board of city improvements to remove the building or structure in a given time, to be named by the board. On failure to comply with the notice, the offending party could be brought before the police court, and, if found guilty on the trial, fined \$20, and the building or structure ordered to be removed or torn down, at the discretion of the city marshal. This ordinance was known as the "street ordinance." Under this ordinance, Lenze was arrested, fined, and the officers of the city ordered to remove or tear down his building. The effect of this proceeding against him and his property will be considered hereafter.

In 1867, and long prior thereto, Kasper Lenze was the owner of a wooden building, over ten feet in height, containing four store-rooms, valued at from \$5,000 to \$8,000, built in 1848, situate on the corner of Frankfort and Seneca streets, and within the "fire limits" in the city of Cleveland. His lease there having expired, he wanted to remove the building and place it on a lot at the corner of St. Clair and Seneca streets, a location also in the "fire limits." He applied to the city council for permission to move his building, and a permit was granted him May 21st. On the 23d of May, he leased the lot on the corner of St. Clair and Seneca streets of Judge Bolton, for a term of fifty years. On the 28th of May, the city council revoked the permit. At the time of the revocation, the city council was advised that Lenze had leased the lot on the corner of St. Clair and Seneca streets, on which he designed to place his building. The city could revoke the permit, but would be responsible for damages incurred, if any, by Lenze whilst it remained in force.

In July, 1867, Lenze, by the agency of Ingham & Treat, building movers, without objection on the part of the city, and, Treat testifies, with the permission of the city council, moved the building into Seneca Street, to a point immediately in front of the lot on the corner of St. Clair and Seneca streets. There the city authorities interposed and forbid placing of the building on the lot. Lenze testifies: "Ingham & Treat moved it to the street up to this lot, and turned the wheels under the building to go on the lot, and the city stopped me; should have moved it on in five hours if the city had not stopped me." Treat testi-

fies: "I could have moved the building on in four or five hours, if the city had not stopped me. . . . We had to use part of St. Clair Street to move the building to St. Clair, so as to put it on this lot, and that is why St. Clair was put in the permit. . . . I acted on this permit to move two buildings. The two buildings in the permit I understood to be *this* building of stores, and the block of five small houses on Frankfort Street."

From this testimony it is clear that this building, at the time the city authorities forbid its being placed on the lot, was lawfully and by the consent of the city in the public street. Lenze had not violated the fire ordinance, because his building was as yet in the street, and he had not violated the street ordinance, because it was in the street by permission of the city, and the license (three days) had not expired. As soon as objection was made by the city to placing the building on the lot, Lenze offered, if permitted to place it on the lot, to make the building conform in all respects to the requirements of the fire ordinance, and to show his good faith in making such offer, tendered to the city council a bond, with security, in the sum of \$3,000. His offer to make his building conform to the law and his bond were rejected by the city council. Heisly testifies:—

"At this time I was acting for Lenze as his counsel. I found the city would not let Lenze put the building on the land he leased of Bolton. The city would not let him do anything with it but tear it down."

On cross-examination, said:—

"They would not let us take it down St. Clair Street. The city insisted that we should tear it down. Would not let us do anything else with it. Lenze offered the city a bond in the sum of \$3,000 to make it comply in every respect to the fire ordinance, but the city would not allow him to do it. M. B. Clark said he had no confidence in him."

In this matter the city was in fault, and acted oppressively. Lenze had violated no law, and it was not proper for the city to assume in advance that when his building was placed on the lot he would fail to make the building such an one as required by the fire ordinance. It should have been permitted him to do what we think he had the legal right to do, place his building upon the lot, and have reasonable time in which to make the building one that would not be obnoxious to the provisions of the fire ordinance. Failing to do this, he would have subjected himself to the penalties of the ordinance.

This ordinance does not prohibit the removal of a building, lawfully in the "fire limits," from one lot to another within that territory. It would not be a violation of its letter or spirit to move the building upon an adjoining lot; and, if lawful to move it twenty feet, it would be lawful to move it two or three hundred feet—the distance this building was to be moved. The city might rightfully prescribe the manner and determine the restrictions under which the removal could be made short of prohibition. Ordinances, as statutes, should receive a reasonable construction, with a view to carry out their intention as shown by their words when clearly expressed, and not extended beyond what they mean, or be enlarged by construction. The ordinance prohibits the erection or placing a building within certain limits which does not answer the description prescribed in the ordinance, but does not prohibit the removal of any

building already within the fire limits from one part of it to another. This building was there at the time the ordinance was made, and it was no violation of the ordinance to change its location from one point to another within the "fire limits."

As before stated, Lenze was arrested, tried, found guilty, fined, and his building ordered to be removed or torn down for violating the street ordinance. This order of the police court made against his building is set out in the answer as a bar to the action for damages. Can it have that effect? If plaintiff's claim for damages was confined alone to the taking down of the building, this order unreversed would present a serious obstacle in the way of his recovery. But Lenze's claim for damages has a broader foundation. As we have already determined, he was forcibly prohibited by the city from putting his building on his lot, and by so doing the city was placed in the wrong. The city could not lawfully require him to place his building elsewhere than on his own premises. Yet when the building was permitted to stand in the public street for more than three days, it became obnoxious to the provisions of the street ordinance and the statute concerning nuisances, and might be removed or torn down without subjecting the party doing so to damages as a trespasser. The city, however, having done a wrongful act in prohibiting him from placing his building on his own lot, — forcibly deprived him of a right, — cannot claim exemption from a liability to pay damages in abating a nuisance under color of law to the injury of one of her citizens. The nuisance here arose out of her own wrongful act in forcibly depriving Lenze of the use of his property, and she must under the law respond to the consequences of her acts done contrary to and aggressive upon the rights of the individual. The amount of damages is to be determined by the facts and circumstances that may surround the case upon the trial.

The plaintiff in error, as a further defence, alleges that Kasper Lenze, at his request, had a conference with the city authorities, "and then and there agreed to and with the said board that the building then standing on and obstructing the public travel on Seneca Street, and which had been unlawfully standing on and obstructing the said street for a long space of time, should by him, this plaintiff, be taken down and removed, and not placed on the said lot, corner of Seneca and St. Clair streets; or that in case he, the said plaintiff, should not take down and remove the same, that then this defendant, its agents, or servants, should be fully authorized to tear down and remove the said building; and that he, the said plaintiff, would claim no damages from said defendant by reason thereof. That such agreement was made with the said Lenze at the said time, and agreed to by said Lenze, for and in consideration of this defendant granting him, said plaintiff, the permission to remove said building, instead of said defendant doing the same at plaintiff's cost."

This can avail the city nothing. By a wrongful act the city created the necessity that resulted in the destruction of the building. It is a vain effort to contract the city out of her liability for damages. The alleged consideration for the agreement is the privilege granted Lenze to tear down his own house, or exempt the city from harm in doing so, — a building he had lawful right to put upon his lot without the consent of the city authorities. This is no consideration, and the alleged agreement is to-

tally wanting in mutuality. For the want of mutuality and a valid consideration to support it, the agreement is void.

It follows from an application of these principles to the following instructions given, or refused to be given, that the court erred when it instructed the jury, over the objection of Lenze:—

“If the jury find that this paper, signed by Kasper Lenze, bearing date July 29, 1867, was not revoked before the building was taken down, then the city had a right to proceed and tear it down; and although the jury should find that this building was torn down under and by virtue of the order and judgment of the police court, still the city would be protected in the tearing down of this building, if this paper of July 29, 1867, had not been revoked.”

And also erred when it refused, on the request of Lenze, to instruct the jury:—

“That the city of Cleveland was bound to give Kasper Lenze a reasonable time to make this building to comply with the fire ordinance of May 10, 1850, said right to be exercised by said Lenze in a careful and prudent manner.”

And “that if the building was standing on the territory lying between Superior, Ontario, Water, and St. Clair streets at the time the ordinance of May 10, 1854, was passed to prevent the erection of wooden buildings, &c., then it was no violation of that ordinance to move said building on said territory from one place on it to another place on it.”

Judgment of the district court, in reversing the common pleas court, affirmed.

SCOTT, Chief Judge, DAY, WRIGHT, and JOHNSON, JJ., concurred.

SUPREME COURT OF THE UNITED STATES.

[OCTOBER TERM, 1876.]

PATENT. — CHANGE OF MATERIAL. — NOVELTY. — REISSUE. — ABANDONMENT.

SMITH v. GOODYEAR DENTAL VULCANITE CO.

Mere change of material does not constitute invention. But where the result of the substitution of one material for another is a superior product, — one having new capabilities and functions, — the substitution amounts to invention. *Hotchkiss v. Greenwood* and analogous cases expounded.

To show want of novelty in an invention the proofs must establish a prior use of that which is in substance the same as the thing patented.

Mere amplification of an original specification will not invalidate a reissue.

A delay of nine years in pressing an application held not to be abandonment.

APPEAL from the circuit court of the United States for the District of Massachusetts.

Mr. Justice STRONG delivered the opinion of the court.

A brief review of the history and nature of the patent which the complainants allege has been infringed will aid materially in solving the questions presented by this appeal. On the 14th day of May, 1852, Dr. John A. Cummings, a dentist of Boston, filed in the patent office a caveat to protect an invention he claimed to have made, of certain new and useful improvements in the setting and plates of artificial sets of teeth. The description accompanying the caveat indicated with very considerable clearness what the alleged invention was, and the objects sought to be gained by it. The improvement was declared to "consist in forming the plate, and also the gums in which the teeth are inserted, of rubber or some other elastic substance, so compounded with sulphur, lead, and other similar substances as to form a hard gum, or whalebone gum, rigid enough for the purposes of mastication, and pliable enough to yield a little to the mouth." "By this improvement," the caveator said, "the teeth can be easily baked into the gums which form one piece with the plate." Subsequently, on the 12th of April, 1855, he applied for a patent, relying in his application that he had previously entered a caveat. His accompanying specification declared the invention to consist in "forming the plate and gums to which the teeth are attached, of rubber or some other elastic material, so indurated as to be rigid enough for the purpose of mastication, and pliable enough to yield a little to the motions of the mouth, and in one piece, the teeth being imbedded in the elastic material while the material is in a soft condition, and then baked with the gums and plate, so that the teeth, gums, and plate will all be connected, forming, as it were, one piece." This application for a patent was rejected on the 19th of May next following, and the applicant was referred to two printed publications, one suggesting the use of gutta percha as a base for artificial sets of teeth, and the other suggesting pastes, analogous to porcelain paste, as well as gutta percha. Cummings then amended his specification by striking out all reference to gutta percha or other merely elastic material, disclaiming the use of gutta percha, and any material which is merely rendered plastic by heat and hardened by cooling, and he claimed the improvement in sets of mineral, or other artificial sets of teeth, which consists in combining the teeth with a rubber plate and gums, which, after the insertion of the teeth, are vulcanized by Goodyear's process, or any other process, forming thereby a cheap, durable, and elastic substitute for the gold plates theretofore used. This amendment, however, proved ineffectual. The application for a patent was again rejected, and a third rejection followed a reconsideration for which the applicant had asked. This third rejection was on the 3d day of February, 1856. From that time onward for several years, indeed until the patent was finally granted, the evidence very satisfactorily shows that Dr. Cummings was in a condition of extreme poverty, utterly unable to bear the necessary expenses of prosecuting his case further. But he did not withdraw his application. He did not ask for a return of part of the fee he had paid, nor by any act of his did he indicate acquiescence in the unfavorable action of the patent office. On the contrary, he continued to assert his expectation of ultimately obtaining a patent, formed plans for his own action after it should be obtained, and com-

plained of what he supposed to be the negligence of his solicitor. The proof of his extreme poverty is ample. His ill-health interfered with his working successfully in the line of his profession, and his family was subjected to great privations. He seems never to have had any considerable money. He borrowed sometimes small sums to purchase under-clothing for himself. He made frequent applications to his friends for advances to enable him to prosecute his application for a patent, offering as a compensation for such advances, sometimes one quarter and sometimes one half of the patent when obtained. He appears never to have remitted his efforts until, in 1864, he induced Dr. Flagg, who had been his partner in former years, and Dr. Osgood to advance, first, one hundred dollars, and afterwards, seven hundred and twenty dollars, by means of which the patent was obtained. Even then he had not the twenty dollars necessary to be paid when it was allowed. For the assistance he thus received he gave one quarter of his invention. Before this time, between the third rejection of his application and his obtaining the advances mentioned, everything was done which was within his power. In February, 1859, in the midst of his pecuniary embarrassments, his solicitor applied to the patent office, not for a return of any portion of the fee paid, nor for a withdrawal of the application, but that the specification and one drawing might be sent to him. This request was refused. An attempt was then made for an appeal to the board, but that not being allowed by the commissioner, nothing further was done in the patent office until the applicant was enabled, by the funds obtained from Drs. Flagg and Osgood, to renew his endeavors. Then, on the 1st of March, 1864, he presented a petition for the grant of a patent to himself for the same invention which he had endeavored to secure in 1855 (the application for which remained in the office unwithdrawn), and accompanied his petition with a specification and drawings corresponding exactly with those he had previously made. This final effort was successful. The office practically acknowledged that the prior rejection had been an error, and declared that in justice to his rights as an inventor, the admission of his claim, limited to the use of hard rubber or vulcanite, as he had before limited it, would not be objected to. Accordingly the patent was granted on the 7th of June, 1864, and by sundry conveyances it subsequently became vested in the complainants. Two surrenders and reissues have since been made, the last dated March 21, 1865, and it is for an alleged infringement of this second reissue that the present suit has been brought. The bearing of this history upon the merits of the controversy will appear as we proceed to examine the several defences set up.

Among these the one perhaps most earnestly urged is the averment that the device described in the specification was not a patentable invention, but that it was a mere substitution of vulcanite for other materials which had previously been employed as a base for artificial sets of teeth, a change of one material for another in the formation of a product. If this is in truth all that the thing described and patented was; if the device was merely the employment of hard rubber for the same use, in substantially the same manner and with the same effect that other substances had been used for in the manufacture of the same articles, it may

be conceded that it constituted no invention. So much is decided in *Hotchkiss v. Greenwood*, 11 How. 248. But such is not our understanding of the device described and claimed. In the specification it is declared that the invention "consists in forming the plate to which the teeth, or teeth and gums, are attached, of hard rubber, or vulcanite, so called, — an elastic material possessing and retaining in use sufficient rigidity for the purpose of mastication, and at the same time being pliable enough to yield a little to the motions of the mouth." This is immediately followed by a description of the manner of the proposed use, that is, of making the hard rubber plates; and the claim, as stated, is "the plate of hard rubber, or vulcanite, or its equivalent, for holding artificial teeth, or teeth and gums, substantially as described," that is, plainly formed as described. The invention, then, is a product or manufacture made in a defined manner. It is not a product alone separated from the process by which it is created. The claim refers in terms to the antecedent description, without which it cannot be understood. The process detailed is thereby made as much a part of the invention as are the materials of which the product is composed. We shall not quote at large the description of the mode of making the plate. Such a quotation would unnecessarily prolong this opinion. It plainly shows a purpose of the inventor to secure what had not been secured before, — a combination of a plate with artificial teeth, or with gums and teeth, in such a manner as to be free from the objections and defects or inconveniences attending the method before practised of attaching such teeth to a metallic plate fitted to the roof of the mouth. Some of these objections are stated — such as expense, hurting the mouth, impeding mastication, and obstruction to perfect articulation. In carrying out the purpose proposed the materials employed were all old. The teeth, the wax, the plaster, the molds, the soft rubber, and the hard rubber were none of them new. It is also true that the steps in the process were not all new. Plaster had been used for formation of molds. The process of forming a plate by the use of such molds was well known, and so was the process of converting a vulcanizable compound into vulcanite by heating it and allowing it to cool in molds. But the process of Dr. Cummings extended beyond the use of known materials and the employment of the processes mentioned. It was vulcanizing soft rubber in a mold and in contact with artificial teeth inserted in place into it while it remained in a soft condition. It was well described by the circuit judge as "the making of a vulcanite dental plate out of vulcanizable compound, into which the teeth were imbedded in its plastic condition, and the rubber compound, with the teeth thus imbedded in it, afterwards vulcanized by heat, so that the teeth, gums, and plate should be perfectly joined without any intervening crevices, and the plate should possess the quality of hard rubber or vulcanite." The combination thus resulted in a manufacture which was "one piece." If, then, the claim be read, as it should be, in connection with the preceding part of the specification, and construed in the light of the explanation which that gives, the invention claimed and patented is "a set of artificial teeth as a new article of manufacture, consisting of a plate of hard rubber, with teeth, or teeth and gums, secured thereto in the manner described in the specification, by imbed-

ding the teeth and pins in a vulcanizable compound, so that it shall surround them while it is in a soft state, before it is vulcanized, and so that when it has been vulcanized the teeth are firmly and inseparably secured in the vulcanite, and a tight joint is effected between them, the whole constituting but one piece." It is evident this is much more than employing hard rubber to perform the functions that had been performed by other materials, such as gold, silver, tin, platinum, or gutta percha. A new product was the result, differing from all that had preceded it, not merely in degree of usefulness and excellence, but differing in kind, having new uses and properties. It was capable of being perfectly fitted to the roof and alveolar processes of the mouth. It was easy for the wearer, and favorable for perfect articulation. It was light and elastic, yet sufficiently strong and firm for the purposes of mastication. The teeth, gums, and plate constituting one piece only, there were no crevices between the teeth and their supporters into which food could gather and where it could become offensive, and there could be no such crevices so long as the articles lasted. They were unaffected by any chemical action of the fluids of the mouth. Besides all this, they were very inexpensive as compared with other arrangements of artificial teeth. To us it seems not too much to say that all these peculiarities are sufficient to warrant the conclusion that the device was different in kind or species from all other devices. We cannot resist the conviction that devising and forming such a manufacture by such a process and of such materials was invention. More was needed for it than simply mechanical judgment and good taste. Were it not so, hard rubber would doubtless have been used in the construction of artificial sets of teeth, gums, and plates long before Cummings applied for his patent. To find a material, with a mode of using it, capable of being combined with the teeth in such a manner as to be free from the admitted faults of all other known combinations, had been an object long and earnestly sought. It had been a subject for frequent discussion among dentists and in scientific journals. The properties of vulcanite were well known, but how to make use of them for artificial sets of teeth remained undiscovered and apparently undiscoverable until Cummings revealed the mode. But when revealed its value was soon recognized, and no one seems to have doubted that the resulting manufacture was a new and most valuable invention. The eminent dentists and experts examined in this case uniformly speak of it as such. Not one has ventured to testify that it was not an invention. They speak of it as "a novel and desirable thing;" as "the greatest improvement in dentistry" made in many years, and as an invention which is "a great benefaction to mankind whereby both health and comfort are promoted." The evidence also shows that it has wrought a revolution in dental practice, and that many thousands of operators are using it in preference to older devices. All this is sufficient, we think, to justify the inference that what Cummings accomplished was more than a substitution of one material for another, — more than the exercise of mechanical judgment and taste, — that it was, in truth, invention. Undoubtedly the results or consequences of a process or manufacture may in some cases be regarded as of importance when the inquiry is whether the process or manufacture exhibits invention, thought, and ingenuity.

Webster, on the subject matter of patents, page 30, says: "The utility of the change, as ascertained by its consequences, is the real practical test of the sufficiency of an invention; and since the one cannot exist without the other, the existence of the one may be presumed on proof of the existence of the other. Where the utility is proved to exist in any degree, a sufficiency of invention to support the patent must be presumed." We do not say the single fact that a device has gone into general use and has displaced other devices which had previously been employed for analogous uses establishes in all cases that the later device involves a patentable invention. It may, however, always be considered, and when the other facts in the case leave the question in doubt, it is sufficient to turn the scale.

We have, therefore, considered this branch of the case without particular reference to *Hotchkiss v. Greenwood*, 11 How. 248. The patent in that case was for an improvement in making door and other knobs for doors, locks, and furniture, and the improvement consisted in making them of clay or porcelain, in the same manner in which knobs of iron, brass, wood, or glass had been previously made. Neither the clay knob nor the described method of attaching it to the shank was novel. The improvement, therefore, was nothing more than the substitution of one material for another in constructing an article. The clay or porcelain door-knob had no properties or functions which other door-knobs made of different materials had not. It was cheaper and perhaps more durable, but it could be applied to no new use, and it remedied no defects which existed in other knobs. Hence it was ruled that the alleged improvement was not a patentable invention. The case does decide that employing one known material in place of another is not invention, if the result be only greater cheapness and durability of the product. But this is all. It does not decide that no use of one material in lieu of another in the formation of a manufacture can, in any case, amount to invention or be the subject of a patent. If such a substitution involves a new mode of construction, or develops new uses and properties of the article formed, it may amount to invention. The substitution may be something more than formal. It may require contrivance, in which case the mode of making it would be patentable, or the result may be the production of an analogous but substantially different manufacture. This was intimated very clearly in the case of *Hicks v. Kelsey*, 18 Wall. 670, where it was said "the use of one material instead of another in constructing a known machine is, in most cases, so obviously a matter of mere mechanical judgment, and not of invention, that it cannot be called an invention, unless some new and useful result, as increase of efficiency, or a decided saving in the operation, be obtained." But where there is some such new and useful result, where a machine has acquired new functions and useful properties, it may be patentable as an invention, though the only change made in the machine has been supplanting one of its materials by another. This is true of all combinations, whether they be of materials or processes. In *Crane v. Price*, 1 Webster's Patent Cases, 393, where the whole invention consisted in the substitution of anthracite for bituminous coal in combination with a hot-air blast for smelting iron ore, a patent for it was sustained. The doctrine asserted was, that if the result of the sub-

stitution was a new, a better, or a cheaper article, the introduction of the substituted material into an old process was patentable as an invention. This case has been doubted, but it has not been overruled, and the doubts have arisen from the uncertainty whether any new result was obtained by the use of anthracite. In *Kneass v. The Schuylkill Bank*, 4 Wash. C. C. 9, the use of steel plates instead of copper for engraving was held patentable. So has been the flame of gas instead of the flame of oil to finish cloth. These cases rest on the fact that a superior product has been the result of the substitution, — a product that has new capabilities and that performs new functions. So in the present case the use, in the manner described, of hard rubber in lieu of the materials previously used for a plate, produced a manufacture long sought but never before obtained: a set of artificial teeth, light and elastic, easily adapted to the contour of the mouth, flexible, yet firm and strong; consisting of one piece, with no crevices between the teeth and the plate; impervious to the fluids of the mouth, unaffected by the chemical action to which artificial teeth and plates are subjected when in place, clean and healthy, — peculiarities which distinguish it from everything that had preceded it. These differences, in our opinion, are too many and too great to be ascribed to mere mechanical skill. They may justly be regarded as the results of inventive effort, and as making the manufacture of which they are attributes a novel thing in kind, and consequently patentable as such.

A second objection urged by the defendant against the validity of the complainant's patent is alleged want of novelty of the invention, and a strenuous effort has been made to convince us that, although hard rubber had not been used in the manner described for the production of the manufacture, equivalent materials and processes had been, and that a plate substantially the same as that of Dr. Cummings had been made before his improvement. We are not, however, convinced. The patent itself is *prima facie* evidence that the patentee was the first inventor, at least it casts upon him who denies it the burden of sustaining his denial by proof. We do not find such proof in the case. Though the patent was not granted until June 7, 1864, the invention was completed at least as early as April 12, 1855, when the application for a patent was made. Indeed, as we have noticed, a caveat to protect it was filed on the 11th of May, 1852, which clearly foreshadowed the invention. Yet, taking the spring of 1855 as the time when it was completed, we find nothing in the proofs to justify a conclusion that Dr. Cummings was not the first inventor. It would answer no good purpose to review the voluminous evidence supposed to bear upon this branch of the case. We shall refer only to that which is deemed most important, and which has been most pressed upon us in this argument. Of the English patent of Charles Goodyear it is enough to say that, though the provisional specification was filed March 14, 1856, the completed specification was not until the 11th of September following. It was, therefore, on the last-mentioned date that the invention was patented.

The experiments made by George E. Hawes, it must be admitted, closely resembled the process described in the reissued patent to the complainants. He cast in molds sets of teeth on a tin base, in a manner very like that in which the vulcanite plate is formed by the Cummings proc-

ess. But the experiments resulted in nothing practical. Hawes cast sets of teeth for the lower jaw only, the weight of the metal making the plate unfit for the upper. In consequence of the shrinkage of the metal in cooling, a tight joint could not be obtained between the teeth and the base. The sets were, therefore, liable to become offensive in consequence of deposits of food and the secretions of the mouth in the crevices. The shrinkage also prevented a close fitting of the plate to the roof of the mouth, and the tin base was affected by the chemical action of the secretions. In consequence of these and other objections the manufacture was soon abandoned, and it may properly be considered an abandoned experiment. It not only was not the same manufacture as that of Cummings, but it was not suggestive of it; and Dr. Hawes, who cast the tin plates, testifies that the use of vulcanite for dental purposes is the greatest improvement in his profession that he knew of in twenty-five years. He adds "that vulcanite may be used by dentists in many ways which could not be accomplished by tin or platinum." In his opinion, therefore, the cast tin base was not substantially the same thing as the Cummings manufacture. So, also, Dr. Royce, who cast plates of tin for artificial teeth in a manner very similar to that of Dr. Hawes, testifies that the solid tin base was found practically unfit for the purpose, except in rare instances. He made but a few sets, none after 1850, and adopted the vulcanite, agreeing to pay for a license to use it in manufacturing dental plates.

We need go no farther into a consideration of the various devices and publications offered to show that the manufacture patented was known before Cummings invented it. Suffice it to say, that none of them, in our opinion, suggest or exhibit in substance such a manufacture. The defence of want of novelty is, therefore, not sustained.

It is further insisted by the defendant that the reissued patent on which this suit is founded is not a patent for the same invention which was described in the specification of the original patent, and, therefore, that the reissue is unauthorized and void. To sustain this position the defendant must overcome the presumption against him arising from the decision of the commissioner of patents in granting the issue, and this he can do only by showing from a comparison of the original specification with that of the reissue that the former does not substantially describe what is described and claimed in the latter. This must plainly appear before we can be justified in pronouncing the reissued patent void. But this, in our judgment, does not appear. The first specification describes a set of artificial teeth having a hard-rubber plate made by a process substantially the same as that indicated in the later patent. The description of the process is not quite so minute, but it is sufficiently full to be understood and to enable an operator to make the manufacture. Certainly it is not another process, and as its result is the same, it is impossible to hold that the reissued patent is for a different invention from the one protected by the original patent. It is true the specification of the reissue describes also another process not described in the specification of the first, namely, a mode of making the molds, but that is not claimed as a part of the invention.

The remaining defences to the bill rest mainly on the assumption that the new petition presented to the patent office in 1864 cannot be regarded

as a continuation of the application made for a patent on the 12th of April, 1855. But this cannot be conceded. The history of the application, as we have given it, forbids such an assumption. No act of Cummings amounted to a withdrawal of his first petition or to an acquiescence in its rejection. It is true, he filed a second petition in 1864, but he accompanied it with substantially the specification that remained in the office, and with the same drawings. It was a mode of procuring another consideration of his rejected claim, and the commissioner regarded it as such. The Act of March 2, 1861, gave him authority thus to regard it. He replied to the application, that his claim was embraced in an application filed by him in 1855, and rejected for want of novelty, admitted that it had been improperly rejected, and suggested an amendment to make it correspond with his former amended claim. It is impossible, in view of these facts, to regard the effort to obtain a new patent in 1864 as a new and independent application, disconnected from the application made in 1855. It was but one stage in a continuous effort. In *Godfrey v. Eumes*, 1 Wall. 317, the first application was actually withdrawn and a new petition was presented at the time of the withdrawal, with a different description of the invention; but as the thing patented under the second might have been engrafted as an amendment of the first, it was ruled that all the proceedings constituted one application. This court said: "If a party choose to withdraw his application for a patent, and pay the forfeit, intending at the time of such withdrawal to file a new petition, and he accordingly does so, the two petitions are to be considered parts of the same transaction, and both as constituting one continuous application." We are not aware that filing a second petition for a patent, after the first has been rejected, has ever been regarded as severing the second application from the first, and depriving the applicant of any advantage he would have enjoyed had the patent been granted without a renewal of the application. The contrary was decided by the circuit court for the Southern District of Ohio, in *Bell v. Daniels*, 1 Fisher, 372, and in *Blandy v. Griffith et al.* 3 Fisher, 609. And these decisions are founded in justice and sound reason.

If then, as we think it must be held, the proceeding to obtain the patent was a continuous one from 1855 until it was granted; if the application of 1855 is not severable from the proceedings of 1864, there is no foundation whatever for the allegation that the invention was abandoned to the public, and that it was in public use or on sale for more than two years before the inventor's application. The first use of it proved, by any other than Dr. Cummings, was in 1859, and there is no evidence that this was with his consent. And the truth respecting his health and pecuniary condition, together with his constant efforts to obtain the necessary means to prosecute his right, rebuts all presumption that he ever abandoned, actually or constructively, either his invention or his application for a patent. That he never intended an abandonment of his invention is perfectly clear, and it was not his fault that granting the patent was so long delayed.

The conclusion of the whole matter is, that the patent is a valid one, and, therefore, that the decree of the circuit court should be affirmed.

The decree of the circuit court is affirmed.

Mr. Justice BRADLEY dissenting. I dissent from the judgment of the court in this case, on the ground that the patentee having duly made his application for a patent in 1855, and the same having been three times rejected, must be considered as having abandoned the same, inasmuch as no further effort was made to obtain a patent until eight years afterwards, without any pretence that the patentee was engaged in perfecting his invention, and in the mean time the invention which he claims as his had come into general public use. The application for a patent made in 1864 was a new and independent application, and should be treated as such. As the public had enjoyed the use of the invention for more than two years prior to this application, the patent should be declared invalid. Great injustice will, in my judgment, be done to the public to allow a patent obtained under such circumstances to stand. The public had a right to suppose that no further application would be made. The levy of a tribute now on all the dentists of the country who have brought the plate into public notice and use seems to me a species of injustice. The delay of the patentee, in fact, is made to operate to his benefit instead of his prejudice; his patent being made to run eight years longer than it would have done had it been granted when first applied for. So that the public is still further injured by sustaining the patent as finally granted. It is too common a case that associated companies, in order to maintain some valuable monopoly, look about to see what abandoned invention or rejected application, or ineffective patent can be picked up, revamped, and carried through the patent office; and by the aid of ingenious experts and skilful counsel succeed in getting the desired protection. I think that the courts ought to be strict in maintaining the rights of the public in such cases. And the present case seems to me to be one in which we ought to hold the patent invalid as against those rights.

Mr. Justice MILLER and Mr. Justice FIELD concur in this opinion.

SUPREME COURT OF ILLINOIS.

[SEPTEMBER, 1876.]

COMMON CARRIER. — DELAY IN TRANSPORTATION CAUSED BY VIOLENCE OF "STRIKERS."

PITTSBURG, FT. WAYNE, AND CHICAGO R. W. CO. v. HAZEN.

A common carrier is liable for loss or injury caused by delay resulting from the refusal of its employees to do duty; but is not liable for loss or injury caused by delay resulting from the lawless violence of former employees "on a strike."

THE appellee, Hazen, recovered a judgment against appellant in the superior court of Cook County. Upon appeal to this court the said judgment was affirmed (the opinion of the court was read by Craig, J., and

will be found below), whereupon the appellant petitioned for a rehearing, which was granted, and the former opinion reversed and judgment entered for appellant.

The following is the opinion announced upon the first hearing in this court: —

CRAIG, J. This was an action brought by Chester Hazen, in the superior court of Cook County, against appellants, as common carriers, to recover damages for a failure to safely and within a reasonable time carry from Chicago to New York a certain quantity of cheese and butter.

A trial was had before a jury, which resulted in a verdict for the plaintiff for \$1,100.55. The court overruled a motion for a new trial, and rendered judgment upon the verdict.

It appears from the evidence preserved in the record that on the 10th of December, 1870, appellee shipped from Chicago to New York, on appellants' freight line, thirty-five thousand pounds of cheese, and a quantity of butter, under an agreement made at Chicago with one Nottingham, who was agent of appellants.

The cheese did not arrive in New York until the 28th day of December, which made seventeen days the goods were upon the road.

The ordinary or usual time required to carry goods from Chicago to New York was nine or ten days.

When the cheese arrived in New York, it was badly frozen. From the 10th to the 23d of December, the weather was fine, and no frost to damage or freeze the cheese.

The evidence shows the damage to the cheese was \$1,100.55.

It also appears, from the evidence, that the goods were detained at Leavitsburg, Ohio, from the 15th to the 22d of December.

Upon the trial of the cause, the appellants offered evidence tending to show that the delay of the goods at Leavitsburg, and the consequent failure to ship and deliver to New York, within a reasonable time, occurred on account of a brakeman's strike for higher wages, on two divisions of the freight line, which began on the 11th of December, and continued about one week; that the strike was not caused through the fault of the railroad company, and reasonable efforts were made to induce the men to return to their work, or employ others to take their places.

This evidence the court excluded from the jury, and in this it is insisted the court erred.

The law is well settled that a common carrier is required, in the transportation of goods, to ship and deliver to the consignee within a reasonable time, and a failure to discharge this duty renders the carrier liable for all proximate damages that result from a failure to discharge this obligation. *I. C. R. R. Co. v. McClellan*, 54 Ill. 58.

The employees of a railroad company, in charge of trains for carrying of passengers and transportation of freight, are held out to the public by the company as being competent to discharge the duties in which they are severally engaged. So far as the public is concerned, the company guarantees the fidelity and good conduct of their employees in matters within the scope of their employment. It is also a rule, well settled, that the company is liable for the frauds and negligence of its agents and employees in the course of their employment. *Galena & Chicago Union R. R. v. Roe*, 18 Ill. 488; Story on Agency, sec. 452.

Then upon what principle the company can shield itself from liability to the public, because its own agent or employees have failed to discharge a duty that he or they may owe to the company, we are at a loss to perceive. Many of the accidents which occur upon a passenger train, to the life or limb of a passenger, for which the company are required to respond in damages, are to be traced directly to the failure of an employee to discharge a duty resting upon him; and yet the doctrine contended for by appellant, when carried to its legitimate extent, would relieve the company of responsibility in any case where the accident was occasioned by the fault of an employee to discharge a duty to the company. Nor can it make any difference whether the strike was occasioned through the fault of the company or the brakemen.

That was a matter entirely between the company and its employees, with which appellee was in no manner concerned, and on account of which he should not be required to suffer loss upon his goods, intrusted to the company for transportation.

The case of *Blackstock v. The New York & Erie R. R. Co.* 20 N. Y. 48, is in point on the question involved. In that case, potatoes were shipped from Steuben County to New York, and the usual time for transportation was five days. The potatoes were on the road seventeen days, and when delivered, it appeared they had been damaged by the delay on the road. The delay was occasioned by a strike of engineers on the company's road, which was caused by the adoption of a certain rule by the company, which the court found to be a reasonable one. The court said: "The position that the defendants are not responsible, because the misconduct of their servants was wilful, and not negligent, cannot be sustained. The action is not brought on account of any injury done to the property by the engineers, but for an alleged non-performance of a duty which the defendants owed to the owner of the property. If the inability to perform was occasioned by the default of persons for whose conduct they are responsible, they must answer for the consequences, without regard to the motives of those persons. . . . It does not appear that any blame can attach to any of the superior officers of the company. Still the property intrusted to the defendants to carry has been lost from a failure on their part to perform the duty with which they were charged, and the only answer which they are able to make to the demand for compensation is, that the failure was caused by the misconduct of their servants. This, we have seen, cannot avail them as a defence." See, also, *Michaels v. New York Cent. R. R. Co.* 30 N. Y.; *Reed v. Spaulding*, 30 N. Y. 630.

We are satisfied, both upon principle and from the authorities, that the court did proper in rejecting the evidence offered.

Whether the delay in the transportation of appellee's goods, which occasioned the damage, resulted from the railroad company or from the refusal of its employees to discharge their duty, in either event the company must be held liable for the damage to the goods.

It is, however, insisted that the court excluded evidence which tended to prove the delay was caused by the assaults which the brakemen made upon the company's trains after they were discharged, and not in the employ of the company, aided and assisted by others who had previously been discharged from the service of the company. The question seems

to be this: Can the company shield itself from the unlawful acts of its employees, for the reason, that after the trains are stopped on account of the refusal of the laborers to perform their duty, the company notify them they are discharged?

We apprehend the excuse offered cannot avail. The unlawful acts done after they are notified of the discharge are but a continuation of what was done before, and are a part of the same act; and those that the employees induced to join them in the raid upon the company's trains, while they would be personally liable to the company for all unlawful acts, yet so far as the rights of the public are concerned, what they did must be referred back to the original cause, — the difficulty between the company and its servants.

The assaults appellants sought to prove may have been provoked by the servants of the company who were in charge of the trains, and it would be manifestly unjust to involve the appellee in an issue of this character. It would be an issue foreign to the one really involved in the case, and one, too, which it would be difficult for appellee to meet.

If appellants were damaged by the unlawful acts of their employees and others, acting in concert with them, they must look to those that did the wrong for redress. On the other hand, if appellee has suffered a loss in his goods by the failure of appellants to transport them without unreasonable delay, they must be held liable for the loss.

It is, however, urged by appellants that the court erred in refusing to give to the jury certain instructions prepared by them.

It appears by the record that the court gave instructions on behalf of appellee, but none of those instructions are contained in the record, and we must decline to pass upon the instructions refused, unless we had before us those that were given. *De Clerg v. Mungin*, 46 Ill. 113.

For aught that we may know or can learn from the record, the law involved in the case may have been properly given to the jury.

Had the appellants desired us to pass on the refused instructions, they should have incorporated in the record those given.

It is said the damages are excessive; upon a careful examination of the evidence we do not find the judgment to be larger than the testimony warrants.

The last point relied upon is, that the record does not show the Cleveland, Columbus, and Cincinnati, and Indianapolis Railroad Company made any contract for the transportation of the goods; the heading to the bill of lading, introduced in evidence, described appellants as Pittsburg, Fort Wayne, and Chicago, C., C. & C. and Lake Shore R. R. Co.'s Express Freight Line, via Crestline.

As we understand the record, that part of the freight line described as the C., C. & C. is the Cleveland, Columbus, and Cincinnati Railroad Company. This part of the freight line was sued as the Cleveland, Columbus, Cincinnati, and Indianapolis Railroad Company.

If, therefore, any part of the freight line was sued by a wrong name, which seems to have been the case, appellant could only take advantage of the misnomer by a plea in abatement in the superior court. This was not done, and the objection comes too late, when made for the first time in this court.

The judgment of the superior court will therefore be affirmed.

F. H. Winston & George Willard, for appellants.

Thomas Moran, for appellee.

The final opinion of the court was delivered by

DICKEY, J. On the 10th of December, 1870, Hazen shipped by the freight line of the railway company a quantity of cheese from Chicago to New York. The cheese was delivered to the consignee at New York on the 28th of December, eighteen days after the shipment, — the proofs tending to show that the usual period of such transit, at that time, did not exceed twelve days ; that the weather from the 10th to the 23d was not severely cold, but that severe cold occurred between the 23d and 28th, and that the cheese when delivered in New York was frozen, and thereby damaged to the amount of \$1,100.55, and for this amount was the verdict and judgment in favor of Hazen, from which the railway company appeal.

As an excuse for this delay beyond the usual period of such transit, the defendant, at the trial below, sought to prove that the sole cause of the delay was the obstruction of the passage of trains in the neighborhood of Leavitsburg, resulting from the irresistible violence of a large number of lawless men, acting in combination with brakemen, who up to that time had been employed by the railway company. That the brakemen refused to work, and were discharged, and other brakemen promptly employed ; but the moving of trains was prevented by the threats and violence of a mob. This evidence was objected to by the plaintiff, and excluded by the court. This, we think, was error. It is doubtless the law that railway companies cannot claim immunity from damages for injuries resulting in such cases, from the misconduct of their employees, whether such misconduct be wilful or merely negligent. If employees of a common carrier suddenly refuse to work, and the carrier fails promptly to supply their places with other employees, and injury results from the delay, the carrier is responsible ; such delay results from the fault of the employees. The evidence offered in this case, however, tends to prove that the delay was not the result of a want of suitable employees to conduct the trains, for the places of the " strikers " were (according to the proof offered) promptly supplied by others. The proof offered tends to show that the delay was caused by the lawless and irresistible violence of the discharged brakemen, and others acting in combination with them. These men, at the time of this lawlessness, were no longer the employees of the company. The case supposed is not distinguishable, in principle, from the assault of a mob of strangers. All the testimony on this subject should have been submitted to the jury for their determination of the question, whether, under all the circumstances, the period of transit was unnecessarily long.

For the delay resulting from the refusal of the employees of the company to do duty, the company is undoubtedly responsible ; for delay resulting solely from the lawless violence of men, not in the employment of the company, the company is not responsible, even though the men whose violence caused the delay had but a short time before been employed by the company.

Where employees suddenly refuse to work and are discharged, and delay results from the failure of the carrier to supply promptly their places, such delay is attributable to the misconduct of the employees in refusing

to do their duty, and the misconduct in such case is justly considered the proximate cause of the delay ; but when the places of the recusant employees are promptly supplied by others, competent men, and the " strikers " then prevent the new employees from doing duty, by lawless and irresistible violence, the delay resulting solely from this cause is not attributable to the misconduct of employees, but arises from the misconduct of persons for whose acts the carrier is in no manner responsible.

The judgment is therefore reversed, and the cause remanded for a new trial.

WALKER, CRAIG, and SCHOLFIELD, JJ., dissented.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

(To appear in 120 Mass.)

PROOF OF LOST WILL. — PRACTICE. — EVIDENCE.

NEWELL v. HOMER.

The burden of proof is on a party, seeking to establish a lost will by parol evidence of its contents, to prove the contents by evidence strong, positive, and free from doubt. If a will, once known to exist, is not found at the death of the testator, it is presumed to have been revoked.

On an appeal from a decree of the judge of probate refusing to approve and allow an instrument alleged to be a copy of a will, the original being alleged to be lost, suppressed, or destroyed since the death of the testator, issues were framed for the jury, covering these questions. *Held*, that an issue proposed by the appellant, and which the judge who tried the case refused to submit to the jury, as to specific parts of the alleged will, was immaterial.

If this court has power, on a probate appeal, to revise the discretion of the judge presiding at the trial of issues of fact before a jury, in refusing to grant a delay in the trial on account of the absence of a witness, no affidavit of the testimony expected nor any statement of the grounds of such expectation having been made, it will only do so where the circumstances connected with the absence of the witness, and his alleged relation to the case, are so peculiar as to require that the ordinary rule should be dispensed with.

To establish by copy a will alleged to have been destroyed or suppressed by parties having an adverse interest thereto, evidence of a conspiracy by such parties to suppress the will is immaterial, unless accompanied with evidence sufficient to justify a jury in finding the execution and contents of the will, and its loss since the testator's death.

A party cannot, under the St. of 1869, c. 425, contradict his own witness, by showing that he has made at other times statements inconsistent with his testimony, without first calling his attention to the circumstances and occasion of the supposed statements.

APPEAL from a decree of the judge of probate, refusing to approve and allow certain instruments alleged to be copies of the last will, and of three codicils thereto, of William H. Bordman, the original will and codicils being alleged to have been lost, suppressed, or destroyed since the death of the testator.

In this court, the following issues of fact were framed for the jury : —

"1. Whereas the said appellant affirms and said respondents deny that the said Bordman deceased leaving a will duly executed, of which the paper annexed to or embodied in the appellant's petition is a true copy :

"2. And whereas the said appellant affirms and said respondents deny that said will was concealed, suppressed, or destroyed by the respondents, or by some of the heirs at law of said deceased, or by Frederic O. Prince, or some one else acting in their behalf :

"3. And whereas said appellant affirms and said respondents deny that said Bordman deceased leaving a codicil duly executed by him, of which the paper marked B, annexed to said petition, is a true copy :

"4. And whereas the said appellant affirms and said respondents deny that said codicil was concealed, suppressed, or destroyed by the respondents, or by some of the heirs at law of said Bordman, deceased, or by Frederic O. Prince, or by some one else acting in their behalf :

"5. And whereas said appellant affirms and said respondents deny that said Bordman deceased leaving a codicil duly executed by him, of which the paper marked C, annexed to or embodied in the appellant's petition, is a true copy :

"6. And whereas the said appellant affirms and said respondents deny that the said codicil was concealed, suppressed, or destroyed by the respondents, or by some of the heirs at law of said deceased, or by Frederic O. Prince, or by some one else acting in their behalf :

"7. And whereas the said appellant affirms and said respondents deny that the said Bordman deceased leaving a codicil duly executed by him, of which the paper marked D, annexed to or embodied in the appellant's petition, is a true copy :

"8. And whereas the said appellant affirms and said respondents deny that the said codicil was concealed, suppressed, or destroyed by the respondents, or by some of the heirs at law of said Bordman, deceased, or by Frederic O. Prince, or by some one else acting in their behalf :

"And whereas the said respondents affirm and the said appellant denies that if the said Bordman did de cease leaving any such codicil as is alleged in the appellant's petition, he, at the time of executing the same, was not of sound mind :

"Now, therefore, it is ordered that a jury be empanelled to try said issues."

The appellant requested that further issues be framed, so much of which as were not substantially the same as those submitted to the jury were as follows : —

"Did the will of William H. Bordman, executed in the presence of Stedman, Mills, and Thayer, contain a bequest to Anna Tilton, now Anna Newell, this petitioner, of an annuity of eighteen hundred dollars a year during her lifetime, the same to be paid to her by his executors ?

"Did William H. Bordman, by a codicil made to his last will and testament, executed in the presence of Cushing, Brooks, and Prince, on or about the thirteenth day of March, 1872, give and devise to Anna Newell, this petitioner, the house on Mount Vernon Street in the city of Boston, then owned by said Bordman, to have and to hold the same to her sole and separate use, free from the control of her husband, and to her heirs and assigns forever ?

"Did William H. Bordman, by a codicil made to his last will and testament, executed in the presence of Cushing, Brooks, and Prince, on or about the thirteenth day of March, 1872, give and devise the sum of five hundred thousand dollars, to be applied to the establishment and support of an institution in the form of a home for the benefit of the working women of Boston, and charge Anna Newell, this petitioner, with the trust and duty of carrying out the same in her sole judgment and discretion, recommending her to seek the advice of Henry C. Brooks in respect to the same?"

"Did said Bordman, by a codicil to his last will and testament, executed in the presence of Cushing, Brooks, and Prince, on or about the thirteenth day of March, 1872, give and bequeath the remainder of his estate, both real and personal, to Anna Newell, this petitioner, and to her heirs and assigns forever, free from the control of her husband?"

"Specify each and every one of the legacies, bequests, gifts, grants, and devises which you find to have been made and contained in the last will and testament made and left by said Bordman, and in the codicils thereto."

Devens, J., refused to submit these questions to the jury, and the appellant excepted. The case was then tried, and at the close of the appellant's evidence the judge directed the jury to return a verdict for the appellees. The issues submitted were answered in the negative; and the appellant alleged exceptions, the substance of which appear in the opinion.

J. F. Pickering, for the appellant.

E. D. Sohler & C. A. Welch, for the appellees.

COLT, J. This is an appeal from the refusal of the probate court to allow the probate of a lost will and three codicils to it, copies of which are annexed to the original petition, and which are alleged to have been lost, suppressed, or destroyed, since the death of the testator.

The burden is on the appellant to prove the execution of these testamentary papers, and to establish their contents by evidence strong, positive, and free from doubt. *Davis v. Sigourney*, 8 Met. 487; *Durfee v. Durfee*, 8 Met. 490, note. It must appear also, upon the allegations made in this petition, that the instruments were in existence uncanceled and unrevoked, at the time of the death of the testator, in order to control the presumption of revocation, which always arises when a will once known to exist is not found at the death. *Davis v. Sigourney*, *ubi supra*; 3 Redfield on Wills, 15; *Brown v. Brown*, 8 El. & Bl. 876, 886; *Idley v. Bowen*, 11 Wend. 227; *Eckersley v. Platt*, L. R. 1 P. & D. 281; *Finch v. Finch*, L. R. 1 P. & D. 371.

In the present case, issues to the jury were framed in advance of the trial, under that provision of the statute which declares that this court, as the supreme court of probate, may submit to a jury any question of fact proper for such trial, upon an issue framed under the direction of the court. Gen. Sts. c. 117, § 18. When the trial came on, the appellant requested a modification of and certain additions to the issues framed, and excepted to the refusal of the presiding judge to grant her request.

In the matter of framing issues, proceedings in probate appeals are conducted in accordance with the rules and practice in equity. The find-

ings of the jury are availed of to inform the court in matters of controverted facts, which may become material in settling the final decree. They may be disregarded in whole or in part, if on the final hearing they are not deemed important, or new issues may be framed from time to time and submitted if the rights of the parties may seem to require it. *Shailer v. Bumstead*, 99 Mass. 112, 131. An appeal lies from an interlocutory order refusing to submit issues requested, and if it is apparent that the matter ought to be first determined by the full court, a stay of proceedings may be had for that purpose. Gen. Sts. c. 113, §§ 10, 12; *Stockbridge Iron Co. v. Hudson Iron Co.* 102 Mass. 45; *Wright v. Wright*, 13 Allen, 207. If the exception here taken could be treated as in the nature of an appeal, to be disposed of before settling the final decree, we cannot see in the case presented that any injustice has been done, by submitting it upon the original issues. Those issues distinctly embrace the several propositions above stated, which the appellant must establish, and upon which the findings of the jury against her are decisive. The amendments and additions requested contain other allegations and denials, but they cannot be material so long as the original issues are not maintained. Additional issues, affirming and denying what are alleged to be partial contents of the instruments in question, were properly refused, because the contents of the whole instrument must be proved, before it can stand as a valid testamentary disposition. *Johnson's Will*, 40 Conn. 587; *Huble v. Clark*, 1 Hagg. Eccl. 115; *Knapp v. Knapp*, 6 Seld. 276.

The appellant excepts to the refusal of the judge to delay the trial or continue the case on account of the absence of witnesses whose testimony was said to be material. She did not attempt to bring her application within the rule which requires an affidavit of the testimony expected from these witnesses, with a statement of the grounds of such expectation, but she claims that the circumstances connected with their absence, and their alleged relation to the case, were so peculiar as to require that the ordinary rule should be dispensed with. But there is nothing in the testimony, or in the facts developed at the trial, which makes this case exceptional, or requires us, if it was in our power so to do, as a matter of law, to revise the discretion exercised by the judge in refusing further delay. The respondents ought not to be subjected to further delay upon a mere suspicion or conjecture that absent witnesses will testify to some important and material fact.

In the course of the trial, numerous exceptions were taken to the exclusion of evidence offered by the appellant. This evidence consisted partly of written documents, and largely of hearsay declarations of her own witnesses and others. Written examinations taken in the probate court upon her complaint were offered, not for the purpose of contradicting the witnesses, but for the purpose of proving, as alleged in the opening to the jury, that there was a conspiracy on the part of some of her witnesses, entered into with the respondents and others, including her former counsel, to prevent her from proving the will and codicils, and that the examinations offered were false proceedings got up in the interest of the respondents and containing in themselves evidence of these facts.

The examinations referred to are annexed to the bill of exceptions, and upon inspection do not appear to have any tendency to prove the alleged conspiracy; and if they had, the evidence would be wholly useless unless accompanied with evidence sufficient to justify the jury in finding the execution, contents, and loss of the will and codicils, since the testator's death. These cannot be established as testamentary, by proving a conspiracy to suppress papers the contents of which cannot be shown.

To control the testimony of her own witness, the appellant offered a petition to the probate court signed by him, showing, as she contended, that the witness believed that a will had been left by the testator other than the one first presented for probate; but the statements in the petition, fairly construed, do not contradict his testimony; and if they did, they could only be admissible under the St. of 1869, c. 425, to contradict the witness, after a foundation is laid by calling his attention to the circumstances and occasion of the supposed statements. They can under no circumstances be used as substantive evidence to support her case.

It would be unprofitable to examine in detail all the remaining exceptions taken to the exclusion of evidence; many of them are but repetitions of the same objection raised by varying the form of the interrogatory. Most of the evidence offered was mere hearsay, for the purpose of proving the alleged conspiracy, and open to all the objections above stated to the admission of the written document; some of it was called for on cross-examination by leading questions to the appellant's own witnesses; much was wholly immaterial and remote, with no tendency to support the real issues of the case; some called for the contents of written papers not produced or accounted for; or attempted to prove the handwriting of such papers by witnesses not qualified as experts and not acquainted with the particular handwriting in question. It is sufficient to say that we cannot see that any evidence was excluded, which was legally competent to maintain the case of the appellant upon the issues presented, and which should have been allowed to go to the jury.

Upon the whole case, we cannot doubt that the jury were rightly directed to return their verdict for the respondents upon all the issues. The only evidence of the execution of any testamentary document, except the original will of 1841 under which the respondents claim, is the testimony of one witness, who says that in 1857 or 1858 he with others witnessed an instrument which the testator either said was his will, or that it was a codicil to his will. No testimony was produced of the contents of this instrument, nor was any attempt made to otherwise identify it. The persons whose names appeared as witnesses upon the papers propounded as codicils were called by the appellant, and each testified that he never witnessed any testamentary paper whatever for the alleged testator. There was no testimony whatever that such papers were in existence uncanceled and unrevoked at the time of the testator's death, and of course there was no evidence of their subsequent suppression by any one. Under these circumstances, to permit the copies here presented to be established as the lawful testamentary dispositions of the alleged testator, would be largely to destroy the security which is afforded to the exercise of the right to control the succession to one's property by will.

Exceptions overruled.

SUPREME COURT OF MICHIGAN.

[OCTOBER, 1876.]

WHEN RETIRING PARTNERS DISCHARGED FROM LIABILITY FOR
PARTNERSHIP DEBTS.SMITH, Impleaded, *ETC.*, v. SHELDON *et al.*

The outgoing members of a firm that is dissolved, are sureties on a partnership debt for those who remain, but they are discharged if the latter, without their knowledge or consent, substitute a new debt, that increases their liability.

OPINION of the court by COOLEY, CH. J.

The legal questions in this case arise upon the following facts : —

Prior to June, 1867, Eldad Smith, Isaac Place, and Francis B. Owen were partners in trade, under the firm name of Place, Smith & Owen, and as such became indebted to defendants in error in the sum of \$969, on book account.

In the month mentioned the firm was dissolved by mutual consent, Place purchasing the assets of his copartners, and agreeing to pay off the partnership liabilities, including that to the defendants in error.

On the second day of the following month Place informed the defendants in error of this arrangement, and that he had taken the assets and assumed the liabilities of the firm, and they, without the consent or knowledge of Smith and Owen, took from Place a note for the amount of the firm indebtedness to them, payable at one day, with ten per centum interest. They did not agree to receive this note in payment of the partnership indebtedness, but they kept it and continued their dealings with Place, who made payments upon it. The payments, however, did not keep down the interest. Place, in 1872, became insolvent and made an assignment, and Smith was then called upon to make payment of the note. This was the first notice he had that he was looked to for payment. On his declining to make payment, suit was brought on the original indebtedness and judgment recovered.

The position taken by the plaintiffs below was that, as they had never received payment of their bill for merchandise, they were entitled to recover it of those who made the debt: the giving of the note which still remained unpaid being immaterial. On behalf of Smith it was contended that by the arrangement between Place and his copartners, the latter, as between the three, became the principal debtor, and that from the time when the creditors were informed of this arrangement they were bound to regard Place as principal debtor and Smith and Owen as sureties, and that any dealing of the creditors with the principal to the injury of the sureties would have the effect to release them from liability; and it is further contended that the taking of the note from Place, and thereby giving him time, however short, was in law presumptively injurious.

Upon this state of facts the following questions have been argued in this court : —

1. Was the note given by Place in the copartnership name for the copartnership indebtedness, but given after the dissolution, binding upon Smith and Owen?

2. If Smith and Owen were not bound by the note, were they entitled to the rights of sureties? And

3. Did the taking of the note given by Place discharge Smith and Owen from their former liability?

On the first point it is argued in support of the judgment that when a copartnership is dissolved the partner who is intrusted with the settlement of the concern should be held to have implied authority to give notes in settlement. On the other hand, it is insisted that in law he has no such authority, and that if he assumes, as was done in this case, to give a note in the partnership name, it will in law be his individual note only.

Whatever might be the case if the obligation which was given had been a mere acknowledgment of the amount due in the form of a due bill, or I. O. U., we are satisfied that there is no good reason for recognizing in the partner who is to adjust the business of the concern an implied authority to execute such a note as was given in this case. This note was something more than a mere acknowledgment of indebtedness, and it bore interest at a large rate. It was in every respect a new contract. The liability of the parties upon their indebtedness would be increased by it if valid, and their rights might be seriously compromised by the execution of paper payable at a considerable time in the future if the partner intrusted with the adjustment of their concerns were authorized to make new contracts. It was assumed in *Farmers' & Mechanics' Bank v. Kercheval*, 2 Mich. 506, 519, that the law was well settled that no such implied authority existed; and we are not aware that this has before been questioned in this state. See *Pennoyer v. David*, 8 Mich. 407. We think it much safer to require express authority when such obligations are contemplated, than to leave one party at liberty to execute at discretion new contracts of this nature, which may postpone for an indefinite period the settlement of their concerns, when a settlement is the very purpose for which he is to act at all.

For a determination of the question whether Smith and Owen were entitled to the rights of sureties, it seems only necessary to point out the relative positions of the several parties as regards the partnership debt. Place by the arrangement had agreed to pay this debt, and as between himself and Smith and Owen he was legally bound to do so. But Smith and Owen were also liable to the creditors equally with Place, and the latter might look to all three together. Had they done so, and made collection from Smith and Owen, these parties would have been entitled to demand indemnity from Place. This we believe to be a correct statement of the relative rights and obligations of all.

Now a surety, as we understand it, is a person who, being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him, to be indemnified by some other person, who ought himself to have made payment or performed before the surety was compelled to do so. It is immaterial in what form the relation of principal and surety is established, or whether the creditor is or is not contracted with in the two capacities, as is often the case when notes are given or bonds taken. The relation

is fixed by the arrangement and equities between the debtors or obligors, and may be known to the creditor or wholly unknown. If it is unknown to him, his rights are in no manner affected by it; but if he knows that one party is surety merely, it is only just to require of him that in any subsequent action he may take regarding the debt, he shall not lose sight of the surety's equities.

That Smith and Owen were sureties for Place, and the latter was principal debtor after the dissolution of the copartnership, seems to us unquestionable. It was then the duty of Place to pay this debt, and save them from being called upon for the amount. But if the creditors, having a right to proceed against them all, should take steps for that purpose, the duty of Place to indemnify and the right of Smith and Owen to demand indemnity were clear. Every element of suretyship is here present; as much as if in contracting an original indebtedness, the contract itself has been made to show on its face that one of the obligors was surety merely. As already stated, it is immaterial how the fact is established, or whether the creditor is or is not a party to the arrangement which establishes it.

This view of the position of the parties indicates clearly the right of Smith and Owen to the ordinary rights and equities of sureties. The cases which have held that retiring partners thus situated are to be treated as sureties merely, have attempted no change in the law, but are entirely in harmony with older authorities, which have only applied the like principle to different states of facts, where the relative position of the parties as regards the debt was precisely the same. We do not regard them as working any innovation whatever. The cases we particularly refer to are *Oakely v. Passeller*, 4 Cl. & Fin. 207; *Wilson v. Lloyd*, Law R. 16 Eq. Cas. 60, and *Mellard v. Thorn*, 56 N. Y. 402.

And it follows as a necessary result from what has been stated, that Smith and Owen were discharged by the arrangement made by the creditors with Place. They took his note on time, with knowledge that Place had become the principal debtor, and without the consent or knowledge of the sureties. They thereby endangered the security of the sureties, and, as the event has proved, indulged Place until the security became of no value. True they gave but very short time in the first instance; but as was remarked by the Vice Chancellor in *Wilson v. Lloyd*, L. R. 16 Eq. Cas. 60, 71, "the length of time makes no kind of difference." The time was the same in *Fellows v. Prentiss*, 3 Denio, 512, where the surety was also held discharged; and see *Okie v. Spencer*, 2 Wheat. 253.

But that indulgence beyond the time fixed was contemplated when the note was given, is manifest from the fact that it was made payable with interest. In a legal point of view this would be immaterial, but it has a bearing on the equities, and it shows that the creditors received or bargained for a consideration for the very indulgence which was granted, and which ended in the insolvency of Place. When they thus bargain for an advantage which the sureties are not to share with them, it is neither right nor lawful for them to turn over to the sureties all the risks. This is the legal view of such a transaction; and in most cases it works substantial justice.

The judgment must be reversed with costs, and a new trial ordered.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

(To appear in 120 Mass.)

STATUTE OF FRAUDS. — DELIVERY OF MERCHANDISE.

SAFFORD v. McDONOUGH.

If a seller of merchandise, in order to maintain his lien for its price, refuses to permit the purchaser to take possession or control of it, he thereby prevents an acceptance and receipt of it by the purchaser within the statute of frauds.

Upon an agreement for the sale of merchandise and payment therefor by a satisfactory note, the purchaser examined the merchandise, had it weighed, marked with his initials, and piled up by itself in the seller's warehouse, to be taken away upon payment for it or giving a satisfactory note for its price. The purchaser never complied with these terms, and the seller refused to allow him to take the merchandise away, claiming a lien upon it for its price. After remaining for several months it was destroyed in the warehouse by fire. *Held*, that there was no such delivery of the merchandise as to constitute the seller a bailee for the purchaser.

MORTON, J. This is an action of contract to recover the price of a quantity of leather, exceeding fifty dollars in value, alleged to have been sold by the plaintiffs to the defendant. There was no memorandum in writing of the contract, and the purchaser did not give anything in earnest to bind the bargain or in part payment.

It appeared on the trial that the defendant on May 17, 1872, went to the plaintiffs' store and agreed to purchase the leather at the price named, to be paid for by a satisfactory note.

On the thirty-first day of the same month, he again went to the plaintiffs' store, examined the leather, had it weighed, marked with the initials of his name, and piled up by itself, to be taken away by him upon giving a satisfactory note for the price, or the payment of the price in money, but not otherwise. He never complied with the terms of the agreement. The plaintiffs refused to allow him to take the leather from their store without such compliance, claiming a lien upon it for the price due. It remained in their store till November 9, 1872, when it was burnt with the store. Upon this evidence the presiding justice of the superior court ruled that the leather had not been so accepted and received by the defendant as to take the contract out of the statute of frauds, and the plaintiff excepted to such ruling.

It should be kept in mind that the question is not whether, if a valid contract of sale upon the terms above named had been proved, the title in the property would have passed to the defendant so that it would be at his risk. In such a case, the title would pass to the purchaser unless there was some agreement to the contrary, but the vendor would have a lien for the price, and could retain possession until its payment. *Haskins v. Warren*, 115 Mass. 514; *Morse v. Sherman*, 106 Mass. 430; *Townsend v. Hargraves*, 118 Mass. 325. But the question is whether the defendant had accepted and received the goods, so as to take the case out of the statute of frauds, and thus complete and make valid the oral contract relied on. Unless there was such acceptance and receipt, there was no

valid contract by virtue of which the title to the goods would pass to the defendant. To constitute this, there must be a delivery by the seller, and some unequivocal acts of ownership or control of the goods on the part of the purchaser. *Knight v. Mann*, 118 Mass. 143, and cases cited.

In the case at bar, there was no actual acceptance and receipt of the goods by the defendant. They were never in his possession or control, but remained in the possession and control of the plaintiffs, who refused to allow him to take them, claiming a lien for the price. If they had and asserted a lien as vendors, this is inconsistent with the delivery of possession and control, necessary to constitute an acceptance and receipt by the vendee. In *Baldev v. Turner*, 2 B. & C. 37, 44, Holroyd, J., says: "Upon a sale of specific goods for a specific price, by parting with the possession the seller parts with his lien. The statute contemplates such a parting with the possession, and therefore, as long as the seller preserves his control over the goods, so as to retain his lien, he prevents the vendee from accepting and receiving them as his own within the meaning of the statute." Benjamin on Sales (Am. ed.), 151, and cases cited; Browne on St. of Frauds, § 317.

It is true there may be cases in which the goods remain in the possession of the vendor, and yet may have been accepted and received by the vendee. But in such cases the vendor holds possession of the goods, not by virtue of his lien as vendor, but under some new contract by which the relations of the parties are changed. *Cusack v. Robinson*, 1 B. & S. 298, 308; *Castle v. Swarder*, 6 H. & N. 828; *Dodsley v. Varley*, 12 A. & E. 632.

In the case at bar, the vendors refused to permit the vendee to take possession or control of the goods, but claimed and asserted their lien as vendors for the price. We are therefore of opinion that the ruling of the superior court was correct.

Exceptions overruled.

T. H. Sweetser & B. F. Hayes, for the plaintiffs.

S. A. B. Abbott, for the defendant.

SUPREME COURT COMMISSION OF OHIO.

(To appear in 27 Ohio St.)

FOREIGN JUDGMENT.—OF THE POWER OF A COURT TO INQUIRE INTO JURISDICTION OF COURT PRONOUNCING SUCH JUDGMENT.—JUDGMENT OF COURT OF ONE OF CONFEDERATE STATES MADE DURING STATE OF WAR.—ATTORNEY AND CLIENT, ETC.

PENNYWIT v. FOOTE.

1. Neither the constitutional provision, that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, nor the act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered.

2. The record of a judgment rendered in another state may be contradicted, as to the facts necessary to give the court jurisdiction; and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist.
3. Such want of jurisdiction may be shown either as to the subject matter, the person, or in proceedings *in rem* as to the thing.
4. The ordinance of secession of the State of Arkansas, the Constitution adopted March, 1861, and the several steps taken by that state, by which it was attempted to secede from the United States and join the Confederate States, were null and void, being in violation of the Constitution of the United States, and the existing Constitution of the state.
5. The state government founded on such new Constitution, and maintained by armed rebellion, was an insurrectionary and unlawful government, and not the legal representative of the state as one of the United States, and its acts and judicial proceedings in violation of the Constitution of the United States, or in derogation of the rights of its citizens, were null and void.
6. The provision of such Constitution, "Schedule, Sec. 1. That no inconvenience may arise from this change of government, we declare that all writs, actions, prosecutions, judgments, claims, and contracts of individuals and bodies corporate, shall continue as if no change had taken place in the Constitution or government of this state; and all process which may have been issued under the authority of this state previous to this time shall be as valid as if issued after the adoption of this Constitution," did not operate during the war to transfer to the courts of the usurping government the jurisdiction previously acquired by the court under the former state government over persons resident in the adhering states.
7. The circuit courts of that usurped government were a constituent part thereof. Their judicial proceedings, within their military lines and during the war, are not such as are, under art. 4, sec. 1, of the Constitution of the United States and the act of Congress, entitled to full faith and credit.
8. As between parties residing in the State of Arkansas and within the rebel lines, and a citizen of Ohio, resident within the Union lines, between whom the war made intercourse impossible, there could be no jurisdiction in such court, by which the rights of non-residents could be injuriously affected.
9. Neither could such jurisdiction be acquired by the consent or waiver of an attorney practising in said court, who was employed and appeared for the non-resident defendants before the war commenced. His general authority as an attorney, before the war, though not revoked by the clients, did not authorize him to waive any of their rights, nor could such consent or waiver confer on the court jurisdiction over the case, or over the person of defendants.

ERROR to the superior court of Cincinnati.

This was an action brought by the plaintiffs against John T. Foote, impleaded with Sheldon Kellogg, late partners, to recover on a judgment rendered against said Kellogg & Foote, in the circuit court of Crawford County, in the State of Arkansas, on the 16th of November, 1861.

The petition contains an averment that said court was a court of record and general jurisdiction; that the action was commenced in that court in October, 1857, and that at the July term of said court, in 1859, the defendants duly appeared by their attorney and filed their plea to the action, on which such proceedings were had; that at the November term of said court, in 1861, a judgment was rendered for plaintiffs for \$960 damages, and for costs.

To this petition John T. Foote answered (Kellogg not being served) that the pretended judgment was rendered in the State of Arkansas, whose people, and the so-called government of the state, were at the time, and for a long time had been, in armed rebellion against the authority and government of the United States, and by a pretended court, acting under the pretended authority of a so-called government, which

was in rebellion, and engaged in making war upon the United States, wherefore it is claimed there is not any record of such a judgment.

To this answer a demurrer was filed, and upon the question thus raised the case was reserved for decision of the court in general term. This demurrer was sustained, and cause remanded to special term, where the following amended answer was filed:—

“The defendant, John T. Foote, for answer to the petition of the plaintiffs, says that on the twenty-sixth (26th) day of October (1857), eighteen hundred and fifty-seven, he, the said defendant, was a citizen and resident of the State of Ohio, and had before been, and up to the month of June (1863), eighteen hundred and sixty-three, continued to be a citizen and resident of said state; that in said month of June, 1863, he removed his residence to the State of New York, of which state he continued to be a citizen and resident for the three (3) years next following the month of June, 1863; that he then, in the year 1866, removed to the State of New Jersey, of which last named state he has ever since continued to be, and now is, a citizen and resident. Defendant further says that the circuit court of Crawford County, in the State of Arkansas, was, on the 26th day of October, 1857, a court of the State of Arkansas, under the government and jurisdiction of the United States of America, and in peaceable relations therewith; and he, the said defendant, then had both in law and in fact all the privileges and immunities of a citizen of the United States, and of the State of Arkansas, in prosecuting and defending actions at law in said court; and as such citizen of the United States he employed counsel and appeared in said case, for the purpose of setting up and maintaining a just and good defence which he had to said action, as shown by the proceedings therein.

“The said defendant further states that afterward, and prior to the rebellion hereinafter stated, and prior to the sixteenth (16th) day of November, eighteen hundred and sixty-one (1861), the persons and bodies of persons holding the chief executive and the legislative offices in the State of Arkansas, combining and confederating with the persons and bodies of persons holding the chief executive and the legislative offices in the States of South Carolina, Georgia, Florida, Alabama, Louisiana, Texas, North Carolina, Tennessee, and Virginia, such persons being all the persons holding chief executive offices and a large majority of all the persons constituting legislative bodies, or any, in each and all said states, including the said State of Arkansas, rebelled against the authority of the United States of America; and by means of a pretended confederate government, known and called the Confederate States of America, levied and waged a war against the United States of America, which said war was raging and continued to rage before and after the said sixteenth (16th) day of November (1861), eighteen hundred and sixty-one.

“And the defendant further avers that the residents of the said State of Arkansas, on, before, and after the said 16th day of November, 1861, including the pretended judges and officers of said circuit court of Crawford County, the said plaintiffs, and the said attorney who had been employed by this defendant, became and were the enemies of the United States, engaged in open rebellion and war against the United States. And the defendant avers that the pretended judge and officers of the said

circuit court were not, on said 16th of November, 1861, acting, or assuming to act, under the authority and jurisdiction of the United States of America, or under the authority of any government existing or established in the said State of Arkansas connected with the government of the United States of America; but under a usurped and illegal government of the said State of Arkansas, and under the said usurped and illegal government known and called the Confederate States of America. And the defendant avers that the pretended judge of the said circuit court of Crawford County, who rendered the said pretended judgment of said court (so-called) on the said 16th day of November, 1861, against the defendant, was not, on said 16th day of November, 1861, and never had been, a judge of the said State of Arkansas, deriving authority from any government of said state as one of the United States of America; but was a person acting and assuming to act under authority derived from the said usurped and illegal governments of the said State of Arkansas, and the said Confederate States of America.

"And the said defendant further avers that on and before the said sixteenth (16th) day of November, 1861, and for a long time thereafter, in the territory between the State of Ohio (of which state defendant was a citizen and resident, until June, 1863, as herein above stated) and in the territory between the States of New York and New Jersey (of which states defendant was subsequently a citizen and resident as herein aforesaid), and the said State of Arkansas, the armies of the United States of America and the armies of the said usurped illegal government of the Confederate States of America were arrayed against each other, and lines were established and maintained, which he, the said defendant, was not at liberty to pass; and communication was cut off and rendered impracticable between the said States of Ohio, New York, and New Jersey, and the citizens thereof, and the said State of Arkansas and the people and inhabitants thereof; all which was well known to the said plaintiffs and to the said pretended judge and officers of the said pretended court. And the said defendant avers that on and before the said 16th day of November, 1861, under an act of Congress of the United States, for that purpose enacted, all commercial intercourse between the citizens of said States of Ohio, New York, and New Jersey, and the residents of the said State of Arkansas, was by proclamation of the President of the United States, prohibited.

"And the said defendant avers that on the said 16th day of November, 1861, he, the said defendant, had not within the said State of Arkansas the free and peaceable exercise of the privileges and immunities of a citizen of the United States, or of the State of Arkansas, as one of the United States of America; but was illegally and forcibly deprived thereof by the acts of the said plaintiffs and the judge and officers of the said pretended court, and others combining and confederating with them, as hereinbefore set forth. And the said defendant insists that said pretended judgment was and is fraudulent and void."

To this was the following reply: —

"The plaintiffs, for reply to the amended answer of the defendants, say that the circuit court of Crawford County, in the State of Arkansas, in and by which the said judgment in the petition mentioned was rendered,

was and is the same court in which said suit by the plaintiffs against the defendants, in the petition mentioned, was instituted on the 26th day of October, 1857, and in which the said defendants appeared and pleaded their pretended defence, mentioned in their said amended answer, and was not another or different court, as pretended in said answer, and was, at the commencement of said suit, and thence continually until and at the time of rendering said judgment, a court of general jurisdiction in law and equity, lawfully established and proceeding under and by virtue of the Constitution and laws of the said State of Arkansas, and that the judge of said court, who rendered said judgment, was, at the time when he rendered the same, duly appointed, qualified, and acting as such, under and by virtue of the Constitution and laws of the said State of Arkansas. And plaintiffs aver that, by the law and usage of the said State of Arkansas, the said judgment of said court now is and ever since the rendering thereof has been of full force and effect, and that the same, at and ever since the commencement of this action, had and now has absolute verity, faith, and credit in all the courts of said state, and remains wholly unreversed; and they deny each and all averments in said answer to the contrary."

The case was again reserved to general term, and then submitted to court on the pleadings and the following agreed statement of facts:—

"This action coming on to be heard, the parties waived the intervention of a jury, and submitted the same for trial by the court, upon the pleadings and the following agreed statement of testimony:

"The plaintiffs offered and read in evidence the transcript of the record of proceedings and judgment in their action against said defendants in the circuit court of Crawford County, in the State of Arkansas, November term, in the year 1861, and the authentication thereof, which is hereto annexed, and marked Exhibit 1; also the transcript of section 4, article 6, of the Constitution of said State of Arkansas, and the authentication thereof, which is hereto annexed and marked Exhibit 2; also the decision of the supreme court of said State of Arkansas, being the highest court of judicature in and of said state, rendered at the December term, in the year 1866, in three causes, reported in volume 24 of a book styled Arkansas Reports, being the official and authorized report of the cases adjudged in said court, viz., the decision in *Hawkins v. Filkins*, reported at page 286, and in *Beller v. Page*, reported at page 363, and in *Belding v. Goodwin*, reported at page 486, which reports and decisions so referred to are made part hereof as though herein fully set forth, and were offered and read by plaintiffs as evidence tending to show the credit and effect due by the law of said State of Arkansas to the said judgment and proceedings in said circuit court of Crawford County.

"And the plaintiffs thereupon rested their case.

"Said defendants then offered testimony that on the 16th day of January, 1861, the legislature of said State of Arkansas passed what was styled a convention bill. That on February 18th delegates to such convention were elected, and that on March 4th the convention met, and on the 6th of May it again met and adopted an ordinance, whereby Arkansas was declared to be a separate and sovereign state; and the ordinance or compact, by which she became one of the United States, thereby repealed, abrogated, and set aside, and the union subsisting between said state and

the United States forever dissolved, and her people and citizens absolved from all allegiance to the United States, or the government thereof, and also authorized the transfer to the so-called Confederate States of America (through its delegates to the Provisional Congress of said Confederate government, which Congress first met and organized February 18th, A. D. 1861), of the arsenal at Little Rock and the hospital at Napoleon, the same belonging to the said United States of America; and that in the month of May, 1861, said Arkansas was formally admitted into the Confederate States of America, and through its delegates gave its adhesion to the Provisional Constitution of said confederation.

"That on the said 4th day of March, 1861, a convention in Arkansas assembled, ordained and established what purported to be a state Constitution, a transcript of which was introduced by defendant, and is hereto attached and marked Exhibit 3; that the same was adopted June 1, 1861, by a convention of delegates assembled, claiming to represent the State of Arkansas, as a member of the so-called Confederate States of America, and that said judgment was rendered by a court whose judges and officers were acting under the authority of the Constitution adopted as aforesaid.

"That the defendant, John T. Foote, on the 26th day of October (1857), eighteen hundred and fifty-seven, was a citizen and resident of the State of Ohio, and continued to be up to the month of June (1863), eighteen hundred and sixty-three, and that from said date last named till June, 1866, he was a resident of the State of New York, and that from June, 1866, till the present time, he was and has been a resident of the State of New Jersey. That afterward, and prior to the 16th day of November, 1861, the said State of Arkansas, combining and confederating with the States of South Carolina, Georgia, Florida, Alabama, Louisiana, Texas, North Carolina, Tennessee, and Virginia, under the pretended authority of the so-called Confederate States of America, levied and waged war against the United States of America, and so continued to do before and after the said 16th day of November, 1861, and that the residents of the said State of Arkansas were engaged in open rebellion and war against the said United States of America.

"And that on and before the said 16th day of November, 1861, and for a long time thereafter, the armies of the United States of America and of said Confederate government were arrayed against each other, and lines were established and continued between the State of Arkansas and the States of Ohio and New Jersey, and all intercourse was prohibited and rendered impracticable between said states.

"And, thereupon, it is certified that the foregoing being all the testimony offered on either part, each of said parties excepted to the competency of the testimony offered by the other to maintain the issue. And it was ordered that the action be reserved for the decision of the court in the general term, upon the pleadings and the testimony aforesaid.

"In witness whereof the judge at special term has hereunto set his hand and seal. M. B. Hagans. [Seal.]"

Exhibit No. 1, referred to, is a copy of the record of the Arkansas judgment authenticated in due form.

It shows that proceedings by attachment were begun in 1856, and at

the February term, A. D. 1858, "the said defendants, by their attorney, Jesse Turner, entered their appearance," and gave their consent to the filing of an amended declaration.

Afterward, in August, 1858, defendants, by their attorney, appeared, and, on his motion, leave was granted them to take testimony by depositions, which appears to have been done by defendants as well as plaintiffs. At July term, 1859, the defendants, by said attorney, filed their plea in the nature of a general denial.

Finally, at the November term, 1861, "the said parties, by their respective attorneys, appear, and neither party requiring a jury, this cause is submitted to the court, sitting as a jury, by *consent of parties*;" and, after hearing the evidence, judgment was rendered against the defendants, whose attorney filed a motion for a new trial, which being overruled, he took a bill of exceptions, which is also made part of the record.

Exhibit No. 2 is composed of extracts from the Constitution of Arkansas, adopted March 4, 1861, by a convention called in due form by act of the legislature, passed January 16, 1861. This convention, on the 6th of May, 1861, adopted an ordinance of secession in the usual form, and also this Constitution, and united with other states in forming the new government called the Confederate States of America, and as such state engaged in the war of the rebellion.

Under this new Constitution, it was declared that all writs, actions, prosecutions, judgments, claims, and contracts of individuals and bodies corporate should continue as if no change had taken place in the Constitution or government of the state, and all process previously issued should be as valid as if issued after its adoption.

It was further declared that all officers under the authority of the state shall continue to hold office until their terms expire under the provisions of this new Constitution, and all were required to take an oath to support the Constitution of the Confederate States of America, as well as of the state, and to abide by and observe all the ordinances passed by the convention aforesaid. Upon this foundation, a state government was set up; the state, from its stand-point, was an independent state, united by compact with the confederacy. As such, she resorted to arms.

King, Thompson & Avery, for the plaintiffs in error. I. The record of the judgment in the Arkansas court was entitled to the same faith and credit which it had by law and usage in that state. Constitution of United States, art. 4, sec. 1; Act of Congress, May 26, 1790, 1 Stat. at Large, 122. As to its validity by the law of Arkansas, see *Hawkins v. Filkins*, 24 Ark. 286, 295, 296, 316, 326; *Beller v. Page*, Ib. 363; *Belting v. Godwin*, Ib. 486; Art. 4, sec. 1, Constitution of United States; *White v. Cannon*, 6 Wal. 443; *Hughes v. Stinson*, 21 La. Ann. 540; *Hill v. Boyland*, 40 Miss. 618; *Harlan v. The State*, 41 Miss. 566; *Brown v. Wright*, 39 Ga. 96; *Bennett v. Morley*, 10 Ohio, 100; *Mills v. Duryee*, 7 Cranch, 481; *Mayhew v. Thatcher*, 6 Wheat. 129; *Caldwell v. Carrington*, 9 Pet. 86; *McElmoyle v. Cohen*, 13 Pet. 312; *Spencer v. Brockway*, 1 Ohio, 260; *Silver Lake Bank v. Harding*, 5 Ohio, 545; *Goodrich v. Jenkins*, 6 Ohio, 44; *Anderson v. Anderson*, 8 Ohio, 108; *Arndt v. Arndt*, 15 Ohio, 33; *Scott v. Pilkington*, 2 Best & Smith (110 Eng. Com. Law), 10; *Jones v. Walker*, 2 Penn. 689; *Lessee of Le Grange v. Ward*, 11 Ohio,

557; *Daniels v. Stevens*, 19 Ohio, 222; *Peck v. Jenners*, 7 How. (S. C.) 612; 17 Ohio, 409; *Paine's Lessees v. Mooreland*, 15 Ohio, 445. But in the superior court it was treated as *ex parte*, and a nullity.

II. The states which seceded in rebellion did not thereby lose their existence or "independent autonomy." Arkansas continued to be a state, and a state of the Union, and the functions of all departments of the state — legislative, executive, or judicial — were unimpaired. Their acts and proceedings were valid, except such as were in aid or furtherance of the rebellion. The confederacy and its measures are held void because it was organized by and for treason only. But the states stood upon a different footing. *Texas v. White*, 7 Wal. 700; *Sprott v. United States*, 20 Wal. 459, 464; *United States v. Insurance Companies*, 22 Wal. 99; *Horn v. Lockhart*, 17 Wal. 580; *Taylor v. Thomas*, 22 Wal. 479, 489.

III. The court erred in applying to a defendant the doctrine of *persona standi in judicio*, which in war suspends contracts by reason of the plaintiff's disability to sue in the enemy's country. 1 Kent Com. 68; *Griswold v. Waddington*, 16 Johns. 438. The plea of alien enemy is available only against the plaintiff, and even then is most strictly construed. 1 Chitty Pl. 479; *Clark v. Morey*, 10 Johns. 69; 3 Camp. 150, 153; 13 Ves. 71, 72, and note. Alien enemy may be sued, though he cannot bring suit. *Miller, J.* 18 Wal. 106, 111. And as to this see *White v. Cannon*, 6 Wal. 406; *McVeigh v. United States*, 111 Wal. 259; *University v. Finck*, 18 Wal. 106; *Van Brymen v. Wilson*, 9 East, 321; *Buckly v. Lytle*, 10 Johns. 117.

The suit in Arkansas was begun, and the defendants, by their attorney, had appeared and pleaded prior to the war. The jurisdiction of the court continued unbroken. The war would have been ground for a continuance, if applied for, but did not abate the suit.

IV. Giving the record due faith and credit, it disclosed the fact that the defendants, by their attorney, submitted the cause and went to trial without objection. The attorney was appointed before the war. No revocation of his authority was shown. The war did not work a revocation. *Buchanan v. Curry*, 19 Johns. 137; *Ward v. Smith*, 7 Wall. 447; *Botts v. Crenshaw*, Chase's Dec. 224; *Anderson v. Bank of Cape Fear*, 1b. 585; *Manhattan Ins. Co. v. Warwick*, 20 Grattan, 614; *Monseaux v. Urquhart*, 19 La. Ann. 482.

V. The authority of an attorney at law is presumed, and the submission of the case by the defendants' attorney to the Arkansas court was conclusive upon them, unless relieved against, in the manner pointed out in *Abernathy v. Latimore*, 19 Ohio, 286; *Treasurer of Champaign County v. Norton*, 1 Ib. 270; *Porter v. Critchfield*, 3 Ib. 518; *Pillsbury v. Dugan*, 9 Ib. 117. The rights of defendants as citizens were not impaired. They had their day in court. 1 Ohio, 270.

McGuffey, Morrill & Strunk, and *Geo. Hoadly*, for defendants in error. I. As to the record of a judgment of one state called in question in another, U. S. Constitution, art. 1, sec. 1; U. S. Stat. at Large, 122; *Bartlett v. Knight*, 1 Mass. 401; 2 Parsons on Contracts, 607; *Hitchcock v. Aicken*, 1 Caines, 460; *Thomison v. Whitman*, 18 Wall. 457; *Maxwell v. Stewart*, 22 Ib. 77.

II. As to the validity of a judgment rendered against a resident of a

state adhering to the Union during the late war, by a court of a seceding state, &c.; and as to whether jurisdiction that had once attached was suspended by the war, *Bissell v. Briggs*, 9 Mass. 462; *Hall v. Williams*, 6 Pick. 232; *The Prize Cases*, 2 Black, 635; *Livingston v. Jordan*, vol. 10, No. 1, Am. Law Reg. 55; *Hanger v. Abbott*, 6 Wall. 632; *The Protector*, 9 Ib. 687; *Dean v. Nelson*, 10 Ib. 158; *Railroad Co. v. Trimble*, Ib. 367; *Ludlow v. Ramsey*, 11 Ib. 581; *Levy v. Stewart*, Ib. 244; *Conley v. Bueson*, 1 Heiskell (Tenn.), 145; *Texas v. White*, 7 Wall. 100; *University v. Finch*, 18 Ib. 106; *Galpin v. Page*, Ib. 350; *Mitchell v. U. S.* 21 Ib. 350, 368; *Fretz v. Stover*, 22 Wall. 198, 206; *Taylor v. Thomas*, Ib. 479, 489; *Ross v. Jones*, Ib. 579, 586; *Perkins v. Rogers*, 35 Ind. 124; *Lasse v. Rochereau*, 17 Wall. 437; *Cappell v. Hall*, 7 Ib. 542; *McVeigh v. U. S.* 11 Ib. 259.

III. Whether the government of Arkansas had a *de facto* or a *de jure* existence, or was merely a usurpation, the court is referred to 7 Eng. Stat. at Large, 436; *Bolton v. Arme*, Cases in Chancery, 55; *Harrison v. North*, Ib. 83; *Latham v. Clark*, 25 Ark. 574; *Robertson v. Sloss*, 7 Coldw. 144; *Harrison v. Gilmer*, 20 La. Ann. 242; *Twiss's Law of Nations*, 297; *Griswold v. Waddington*, 15 Johns. 438; *The Prize Cases*, 2 Black, 635; *Martin v. Hewitt*, 44 Ala. 418; *Noble & Co. v. Collins & Co.* Ib. 554; *White v. Texas*, 7 Wall. 701; *Bank of Tenn. v. Woodson*, 5 Coldw. 176; *Conley v. Bueson*, 1 Heiskell, 145; *Cassell v. Backreck*, 42 Miss. 56; *Thomas v. Tyler*, 42 Ib. 651.

JOHNSON, J. The facts disclosed present for our consideration important and novel questions growing out of the late civil war. They involve a determination of the legal effect of the secession of the State of Arkansas, and the war that ensued, upon the power of the courts of that state, during the war, to render judgment against a citizen of Ohio, and also the extent to which faith and credit should be given to a judgment thus rendered, under the Constitution and laws of the United States.

On behalf of the plaintiff, it is claimed that full faith and credit should be given to this judgment, under article 4, section 1 of the Constitution of the United States, as a judicial proceeding of a state; but if it is not such, then at least it is entitled to all the verity of a foreign judgment, as the proceeding of a *de facto* court, having jurisdiction of the case and the parties.

The defendants insist that this is not the record of a court of a state of the Union; that while the act of secession was void, and the state was never legally out of the Union, yet the government that was set up by the people of the state was a revolutionary usurpation in violation of the Constitution; that this government was a government of force, maintained by arms; that all acts, legislative, executive, and judicial, were, as to the United States and its citizens, null and void.

It is further insisted that this was a war, in the sense of public law, and that the courts of Arkansas had no power to proceed to judgment against defendants; that they were by the war, and the duty which was imposed, as well as by the danger attending it, forbidden to appear and defend.

It appears that this action was begun by the plaintiffs in the circuit court of Crawford County in 1857.

Personal appearance was entered and issue joined prior to the war.

After the state had joined the Southern Confederacy, and while it was in arms against the Union, the case was tried. The attorney for defendants, who was retained and appeared before the war, continued to do so on the trial of the case, and consented to a trial. It is claimed these facts gave the court jurisdiction over the person, but the other side insists that such appearance could confer no power on the court to do an unauthorized act, and that the war worked a revocation of this agency.

1. Article 4, section 1, of the Constitution of the United States provides that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state; and the Congress may, by general laws, prescribe the manner in which such acts and proceedings shall be proved, and the effect thereof." Under the power thus conferred, Congress passed the Act of May 26, 1790, which provided that "the records and judicial proceedings of the courts of any state shall be proved or admitted in any other court within the United States, by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with the certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the attestation is in due form. And the said records and proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence said records are or shall be taken."

Leaving out of view for the present the facts relied on as a defence in this case, let us inquire as to the scope and meaning of this constitutional provision and the act of Congress.

What acts, records, and judicial proceedings are entitled to full faith and credit, and what is a judgment of a court of a state that imports absolute verity?

By the Act of 1790, a judgment which is valid in the state where rendered becomes, in the other states, a debt of record, not reëxaminable upon the merits, but it does not carry with it into another state the efficacy of a judgment against person or property that can be enforced by execution. To give it that force in another state, it must by action be made the judgment of such other state.

Hence it follows that such judgment is only *evidence* in another state that the subject matter of the original suit has become a debt of record, which cannot be avoided by a plea of *nul tiel record*. *McElmoyle v. Cohen*, 13 Pet. 330.

In an action on such judgment in another state, whatever pleas would be good in the state where rendered would be good in such other state. *Hampton v. McConnell*, 3 Wheat. 234.

The constitutional provision was not intended to confer a new power of jurisdiction on the courts of any state, but to prescribe the effect in other states of the acknowledged jurisdiction over persons and things within the state. Every judgment depends, for its force and validity, on the competency and authority of the tribunal which pronounces it, and may be assailed by showing a want or failure of jurisdiction over the subject matter or the person, even though absolutely conclusive in other particulars.

The manifest design of the Constitution was to give faith and effect to

valid judgments, and not to enable the courts of one state to exercise a usurped or illegal authority over the citizens of other states of the Union, who are not amenable to the jurisdiction of the tribunal.

Without the constitutional provision and the Act of 1790, the judgments of one state would stand in the tribunals of the others on the same footing as *foreign judgments*, and only be respected on the principles of comity between nations, and not as a duty imposed by the paramount organic law. How far such judgments of a state of the Union, when duly authenticated, are entitled to faith and credit, and are conclusive, is a problem by no means free from difficulty. It has been productive of numerous decisions, not always harmonious.

One of the earliest cases was *Bissell v. Briggs*, 9 Mass. 462, where it was said: "Whenever, therefore, a record of a judgment of any state is produced as conclusive evidence, the jurisdiction of the court is open to inquiry. And upon the same principle, if a court of any state should render a judgment against a man not within the state, nor bound by its laws, nor amenable to the jurisdiction of its courts; and if that judgment should be produced in any other state against the defendant, the jurisdiction of the court might be inquired into, and if a want of jurisdiction appeared, no credit would be given the judgment.

"In order to entitle the judgment rendered to the full faith and credit mentioned in the federal Constitution, the court must have jurisdiction, not only of the cause, but of the parties."

The same view was declared and enforced in *Hall v. Williams*, 6 Pick. 222.

In *Rose v. Himely*, 4 Cranch, 269, Chief Justice Marshall says: "Upon principle, it would seem that the operation of every judgment must depend on the *power of the court* to render that judgment. . . . In some cases, the jurisdiction depends as well on the *state of things* as on the constitution of the court."

For a long time after the adoption of the Constitution, it was supposed that its effect, in connection with the Act of 1790, was to render the judgments of each state equivalent to domestic judgments in every other state; and this view was supported by the language of the Court in *Mills v. Duryee*, 7 Cranch, 484. It was so held in that case, and that a plea of *nil debet* was not a proper plea to an action on such judgment.

So far as the merits of that case are concerned, the doctrine there laid down is still adhered to; but as to the validity of a judgment dependent on the power of the court, quite a different view is now entertained.

Mr. Justice Story, who delivered that opinion, elsewhere says: "But this does not prevent an inquiry into the jurisdiction of the court, in which the original judgment was given, to pronounce it; or the *right of the state itself* to exercise authority over the person or the subject matter. The Constitution did not mean to confer upon the states a new power or jurisdiction, but simply to regulate the acknowledged jurisdiction over persons and things within their territory." Story on Const. sec. 1313. Again he says: "It did not make the judgments of other states domestic judgments to all intents and purposes, but only gave a general validity and credit to them as evidence." Story on Conflict of Laws, sec. 609.

Chancellor Kent (1 Kent Com. 281, and vol. 2, p. 95, and note) says:

"It is only when the jurisdiction of the court in another state is not impeached, either as to the subject matter or the person, that the record of the judgment is entitled to full faith and credit."

This distinction is strongly supported by *D'Arcy v. Ketchum*, 11 Howard S. C. 165, where the case of *Mills v. Duryee* was limited and explained.

It was there held that the constitutional provision and act of Congress giving full faith and credit to the judgments of each state, in every other state, do not refer to judgments rendered by a court having no jurisdiction of the parties — that it only referred to valid judgments.

It is an important feature of that case, that by the law of the State of New York, where the judgment was rendered, it was valid. It was a judgment against two joint debtors, only one of whom was served. Under the state law, this was a valid judgment against both, and if the language of the Act of 1790 had full force, this judgment, when properly authenticated, "shall have such faith and credit given it in every court within the United States as it had by law or usage in the courts of the state from whence it was taken;" and yet when sued on in Louisiana, it was held void as to the party not served, though valid by New York law. It was said: "The international law as it existed among the states in 1790, that a judgment rendered in one state, assuming to bind the person of a citizen of another, was void within the foreign state, when the defendant had not been served with process or voluntarily made defence, because neither the legislative jurisdiction nor that of the courts of justice had binding force. . . . In our opinion, Congress did not intend to overthrow the old rule."

In *Webster v. Reed*, 11 Howard, 437, the defendant offered to defeat the force of a judgment by showing want of service, and it was held it could be done.

In *Starbuck v. Murray*, 5 Wend. 148, it is said: "Unless a court has jurisdiction, it can never make a record which imports uncontrollable verity to the party over whom it has usurped jurisdiction, and he ought not therefore to be estopped by any allegation in the record from proving any fact that goes to establish the truth of the plea alleging want of jurisdiction. So long as the question is in issue, the judgment of a court of another state is, in effect, like a foreign judgment — it is *prima facie* evidence."

From a careful review of numerous cases, we find the rule now well settled that neither the constitutional provision, that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, nor the act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court in which a judgment offered in evidence was rendered, and such a judgment may be contradicted as to the facts necessary to give the court jurisdiction, and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist, and this is true either as to the subject matter or the person, or in proceedings *in rem* as to the thing. *Harris v. Hardiman et al.* 14 Howard S. C. 334; *Borden v. Filch*, 15 Johns. 141; *Christmas v. Russell*, 5 Wallace, 290; *Elliot v. Piersol et al.* 1 Pet. 328; *United States v. Arredondo*, 6 Pet. 691; *Vorhees v. Bank*

of *U. S.* 10 Pet. 475; *Moulin v. Insurance Co.* 4 Zab. 222; *Mackay v. Gordon*, 34 New Jersey, 286; *Wilson v. Bank of Mt. Pleasant*, 6 Leigh, 570; Story on Const. sec. 1307; Story on Conf. of Laws, sec. 609; *Thompson v. Whitman*, 18 Wallace, 457; *Spencer v. Brockway*, 1 Ohio, 261; *Goodrich v. Jenkins*, 6 Ohio, 44; *Anderson v. Anderson*, 8 Ohio, 108; *Paine's Lessees v. Mooreland*, 15 Ohio, 445.

It follows that while a judgment of a competent court of any state of the Union, that has jurisdiction or authority over the person and subject matter, is conclusive upon the merits of the controversy in every state, yet the power of the court to render it is an open question in an action like the present.

It is competent, therefore, in such action, to inquire into the authority of the pretended court to exercise judicial functions, whether this record comes from a lawful tribunal, within a state of the Union, whether that tribunal had jurisdiction of the subject matter, and whether it had by any legal method obtained jurisdiction over the person, in order to determine whether it was a valid judgment under the Constitution. Either of these inquiries does not affect the merits of the controversy in the original action.

II. Was this record a judicial proceeding of a court of one of the states of the United States?

The state had seceded and dissolved its connection with the United States. It declared independence, and joined the Confederacy. These acts were null and void, but on this foundation a new Constitution with allegiance to the Confederate States was adopted, and for the time was maintained by armed rebellion. Civil war ensued. The existence of this new authority was being determined by wager of battle.

This usurping government was one unknown to the Constitution, and in direct antagonism to it and the authority of the federal laws and authority. It could acquire no legal authority over the people of the United States, and no actual power beyond the range of its guns. When the armed forces, raised to establish this new government and make good their declaration of secession and independence, surrendered, this unlawful state government fell. The present Constitution and state government of Arkansas is not the successor of that, and derives none of its power from its prior existence. The Congress refused to recognize it, or the validity of its acts. By the reconstruction acts, it was declared there was no legal state government to represent the state in the Union, and Congress took steps to organize a government in conformity to the paramount laws of the Union.

The courts of this usurped state government, set up on the ruins of the old, and dependent for its existence on organized treason, had no power over citizens of other states not domiciled there. It could acquire none by the steps taken. The defendants might cheerfully enter their appearance, and consent to have their case tried by a court of a state government in harmony with the Union, that recognized the binding force of the Constitution and laws of the United States, and where he was entitled to all the rights and immunities of a citizen of the United States, while he would be utterly unwilling to consent to be tried by a foreign court of a nation at war with his government, and where his rights as an American citizen are ignored.

These defendants never consented to surrender their rights as citizens of the United States, guaranteed by its laws, and commit the issue to a court of new organization. The convention had no power to transfer this case from out the protection of federal laws, and make it amenable to the decision of a court unknown to them. What, then, was the *status* of the State of Arkansas, and the circuit court of Crawford County, under the new state organization, as a state of the Confederacy?

In *Texas v. White*, 7 Wall. 700, Chief Justice Chase says:—

“Not only, therefore, can there be no loss of the separate and independent autonomy of the states, through their union under the Constitution, but it may be not unreasonably said that the preservation of the states, *and the maintenance of their governments*, are as much within the design and care of the Constitution as the preservation of the Union and maintenance of the national government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states. . . . Our conclusion, therefore, is that Texas continued to be a state, and a state of the Union, notwithstanding the transactions to which we have referred.”

In these remarks, the word *state* is used, not to mean the *political organization* or *government*. The chief justice says: “The people, in whatever territory dwelling, either temporarily or permanently, and whether organized under a regular government, or united by looser and less definite relations, constitute the state. A state, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. It is the union of such states, under a common constitution, which forms the distinct and greater political unit, which that Constitution designates as the United States, and makes of the people and states which compose it one people and one country.” Using the term “state” in this sense, it was said by the court “that Texas continued to be a state, and a state of the Union.” After reciting the steps taken by the state to go out of the Union and join the Confederacy, much the same as in the case of Arkansas, it is added: “When the war closed there was no government in the state, *except that which had organized for the purpose of waging war on the United States*. . . . That government immediately disappeared. . . . There being no government in constitutional relations with the Union, it became the duty of the United States to provide for the restoration of such a government.” Speaking of the acts of the rebel legislature of Texas, the court say: “It cannot be regarded in the courts of the United States as a *lawful legislature, or its acts lawful*.”

It is added, however, that it was for some purposes a government *de facto*, an actual government, which, though unlawful and revolutionary, possessed power over its own people in such matters as did not affect the duty of the state, or the people of the state, to the Union. The Chief Justice says:—

“It is not necessary to attempt an exact definition within which the acts of such a state government must be treated as valid or invalid. It may be said, perhaps with sufficient accuracy, that acts necessary to peace and good order among citizens—such, for example, as acts sanctioning

and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries of person and estate, and other similar acts, which would be valid if emanating from a lawful government — must be regarded as valid when proceeding from an actual, though unlawful, government; and that acts in furtherance and support of the rebellion against the United States, and intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void."

Horn v. Lockhart, 17 How. 571, involved the power of a probate court of Alabama to make an order, during the war, based on an act of the legislature authorizing an executor to invest trust funds in Confederate bonds. It is said, "No legislation of Alabama, no acts of its convention, no judgment of its tribunals, and no decree of the Confederate government can make such a transaction lawful."

It is further said, "That the acts of the several states, in their individual capacities, and of their different departments of the government, executive, *judicial*, and legislative, during the war, so far as they do not impair or tend to impair the supremacy of the national authority, *or the just rights of citizens under the Constitution*, are, in general, to be treated as valid."

Huntington v. Texas, 13 Wall. 650, turned on the power of the government of Texas, during the rebellion, to pass title to certain bonds of the United States, owned by the state. It is said, "Whether the alienation of the bonds by the *usurped government* divests the title of the state depends, as we have said, upon other circumstances than the quality of the government. If the government was in the actual control of the state, the validity of its alienation must depend *on the purposes and object of it*."

The same point was before the supreme court in *Taylor v. Thomas*, 22 How. 479.

The rebel legislature of Mississippi passed an act authorizing the issue of \$5,000,000, in what was called "cotton notes," issued in form of currency, with which the state purchased cotton during the blockade. It is said, "That the legislature in question, subsequent to the adoption of the secession ordinance, and of the ordinance by which the state acceded to and became a member of the insurrectionary Confederacy, *ceased to represent the state as a constitutional member of the federal Union*."

These usurped state governments were not the states, and while the states, in the legal and constitutional meaning of the term, were still in the Union, the political organization, the governments in armed rebellion, were insurrectionary and unlawful. It did not represent the states as members of the federal Union.

In *Thorington v. Smith*, 8 Wall. 1, the character of the Confederate government, formed by the seceding states, is considered, as it affected contracts of citizens, *within its military lines*. It is styled a government of "paramount force," whose existence is maintained against lawful authority by active military power. It is said, its existence was never acknowledged by the United States, even as a *de facto* civil government; but, while it existed, it was necessarily the duty of private citizens

to acquiesce in its authority, and for such obedience the private citizen was not liable to his lawful government. On this ground, between citizens resident within its jurisdiction, a contract to pay in Confederate notes was valid.

In support of this view is the case of *United States v. Rice*, 4 Wheat. 203, where it was held that the inhabitants of the village of Castine, in Maine, which was captured by the British in the War of 1812, and held until the treaty of peace, in 1815, passed under a temporary allegiance to the British government, which, as to them, suspended the operation of the laws of the United States.

So the military conquest and occupancy of Tampico and the State of Tamaulipas, during the Mexican War, by the army of the United States, did not make that territory a part of the United States; but as to other nations, while it was so occupied, it was deemed a part of the United States. *Fleming v. Page*, 9 How. 66.

In *Livingston v. Jordan*, Chase's Decisions, 454, the Chief Justice says: "The courts of a state forming part of the Confederate States had no jurisdiction, during the civil war, over parties residing in states which adhered to the national government."

This case is important because of its similarity to the present.

A party acting as *prochein ami* for infants, owners of a plantation situate in that state, but who resided in Maryland, filed a petition, in 1861, in the court of equity of Sumter County, South Carolina, where the land was situate, on a contract for the sale of the property by such party, and asking for confirmation. The sale was confirmed in March, 1861, and a deed was made for the property to the purchaser.

Upon coming of age, and after the war, the infants repudiated the sale, and brought ejectment, and their right to recover turned on the validity of this decree, made on the application of their next friend. This was impeached on two grounds: 1st. That the contract of sale was made without authority to bind them. 2d. That the war suspended the power of the court to bind residents of Maryland.

Upon this last point, it is said: "The jurisdiction of the state court over the plaintiff, whatever it was, terminated when the civil war broke out. Upon that point we entertain no doubt. As between parties residing in the State of South Carolina, and parties residing in the states which adhered to the national government, between whom war made intercourse impossible, there could be no jurisdiction in the courts of South Carolina, while the war continued, by which the rights of non-residents could be injuriously affected." While these remarks were not necessary to the decision of that case, they are nevertheless in point as the opinion of an eminent jurist.

Brooks et al. v. Feler et al. 35 Ind. 402, was a bill of review filed in Indiana after the war was over to review a decree made on an original suit commenced in 1861 by the plaintiffs' attorney, in which a decree was rendered during the war. The attorney had been employed just before the war by the plaintiff, who resided in Virginia, but who had no knowledge that the suit had been commenced or prosecuted to unsuccessful judgment until after peace was restored. The court say a state of war existed between Virginia and Indiana, and that it was error of law to

render judgment; that the court had no legal power to do so. We cite this case in support of the proposition before us, but without assenting to its application to the case before the court of an adhering state. See recent case in 66 Ill.

In *Mosely v. Tuthill*, 45 Ala. 646, the validity of an order of the probate court of that state, made in 1863, to sell lands, while the state was under the control of the insurrectionary government, was considered.

The court say: "Undoubtedly the court that made the order for this sale *was not a court of a state of the Union.*"

The same view was distinctly announced by Justice Woodbury, in 1846, in the case of *Scott v. Jones*, 5 How. (S. C.) 378. Speaking of the unauthorized government which had been erected in the Territory of Michigan, before the admission of that state into the Union, he says: "Such conduct by bodies situate within our limits, unless by states duly admitted into the Union, would have to be reached either by the power of the Union to put down insurrection, or by the ordinary penal laws of the states or territories within which these bodies unlawfully organized are situated and acting; while in that condition their measures are not examinable at all by writ of error to this court, *as not being statutes of a state or member of the Union.*"

In Illinois it has been held, that a citizen of that state might maintain an attachment against a resident of Alabama during the war, and, if no objection was interposed, proceed to judgment and sale of the property, notwithstanding the war, and that proceedings to condemn land might be had under the same circumstances. *Mixer v. Sibley*, 53 Ill. 61. While this proceeding would be regarded as binding in the state courts of Illinois, it would hardly be recognized in another state, if an action was brought on such a judgment.

Ludlow v. Ramsey, 11 How. (S. C.) 581, was an attachment against a defendant, *who had voluntarily left his residence in Tennessee*, where the action was, and for the purpose of engaging in hostilities against the United States, and *for that reason* he could not "be permitted to complain of legal proceedings regularly prosecuted against him as an absentee, on the ground of inability to return, or to hold communication with the place where the proceedings were conducted."

On the contrary, it was held in *Dean v. Nelson*, where the defendant was ordered out of the city of Memphis by Union officers, and while within the Confederate lines proceedings in attachment were had against him:—

"The defendants in the proceedings were within the Confederate lines.

"Two of them had been expelled the Union lines, and not permitted to return; the other had never left the Confederate lines. A notice directed to them, and published in the newspapers, was an idle form. They could not lawfully see or obey it. As to them the proceedings were wholly void." *Bradley, J., Dean v. Nelson*, 10 Wall. (S. C.) 158. See, also, *Don v. Lipman*, 5 Clarke & Fin. 1.

So in *R. R. Co. v. Trimble*, 10 Wall. 367, a decree in equity in one of the loyal states against a party, who, having been engaged in the rebellion, was a prisoner of war of the United States outside of the state, and

against whom there was no service, was held of no effect, and that a sale under it was void.

In *Botts & Darnall v. Crenshaw*, Chase, 224, one of the questions was as to the validity of an order of the court of hustings, of Virginia, a court of general equity jurisdiction, made on the application of plaintiffs' attorney, during the war, by which the attorney invested his client's money in Confederate bonds. The plaintiffs were resident citizens of Kentucky. Judge Chase says: "They being citizens of a state adhering to the United States, residing there, this order cannot be recognized by this court, *because it is an act in derogation of the rights of persons beyond the jurisdiction of the de facto government of Virginia, of which the court was a constituent part*, and because it is an act the tendency and effect of which was to sustain the course of the Confederate government, and aid in its struggle against the United States."

In the same case it was held that the ordinary relation of attorney and client was not dissolved by the war, and, therefore, that Crenshaw, who was employed before the war to collect a claim in Richmond, Virginia, continued to be plaintiff's attorney during the war for the purpose of making the collection and holding the money; but that his application as such attorney to the court, by which he obtained this order to invest the funds after collection, conferred on the court no power to bind the client, who resided in Kentucky. That is our view of this case, that while defendant's attorney would have continued such, notwithstanding the war, for the purpose of protecting and saving his property and rights, yet he had no power to waive any of his client's rights, as he did, by failing to plead a suspension of proceedings because of the war, much less could he consent that the ultimate rights of his client should be determined by a court which was a constituent part of a *de facto* government, that had no power over citizens of the United States beyond its military lines.

The regular course of justice was interrupted by revolt; the United States courts, post-offices, and other agencies of the general government were closed; its laws were ignored and defied. This new *régime* had a "boundary marked by a line of bayonets, which could be crossed only by force." By the public law of the civilized world, the judge, attorneys, officers of the court, and jury, were the enemies of defendants, acknowledging no allegiance to the Constitution and laws of the Union.

All intercourse was forbidden; all remedies were suspended. "The suspension of the remedy during the war is so absolute that courts of justice will not even grant a commission to take testimony in an enemy's country." *Hanger v. Abbott*, 6 Wall. 532.

It was the duty of the attorney, either to have declined to appear as defendants' attorney, or, if he appeared, to have taken the proper steps to suspend the proceedings. His consent to a hearing at the time and under the circumstances was not in the interest of his clients, and clothed the court with no jurisdiction.

Again, by the state of civil war, these defendants became the public enemies of the State of Arkansas and its people, and they were our enemies.

The ordinary rules applicable to all public wars between independent nations would govern in determining the powers of the courts of that state

over citizens of other states, conceding to that state authority to prosecute a war against the United States.

Vattel says: "A civil war breaks the bands of society and government, or at least suspends their force and effect; it produces in the nation two independent parties, who consider each other as enemies, and acknowledge no common judge."

In the *Prize Cases*, 2 Black (S. C.), 1, the court says:—

"The people of the rebel states were then to be deemed enemies of the people of the loyal states.

"Several of these states have combined to form a new confederacy, claiming to be acknowledged by the world as a sovereign state. Their right to do so is now being decided by a wager of battle. The posts and territory of each of these states are held in hostility to the general government. It is no loose, unorganized insurrection, having no defined boundary or possession. It has a boundary marked by lines of bayonets, and which can be crossed only by force. South of this line is enemy's territory, because it is claimed and held in possession by an organized, hostile, and belligerent power. All persons residing within this territory, whose property may be used to increase the revenues of the hostile power, are, in this contest, liable to be treated as enemies, though not foreigners. They have cast off their allegiance, and made war on their government, and are none the less enemies because they are traitors."

It must be borne in mind that we are not considering the validity of this judgment as if it were the act of a court of a state government of the Union, but as the act of a court of an insurrectionary government, that by force has supplanted the lawful government of a state in the Union.

Neither are we seeking to determine the effect of a judgment of a state court against an alien enemy, rendered during hostilities, in the courts of the same state where rendered.

An alien enemy, residing in a state at war with his own state, may be proceeded against, if no objection is interposed, to final judgment, and the courts of such state would treat it as valid judgment. So perhaps it may, if, after service, he departs the realm before hostilities cease, and returns to his own state; but when that judgment of the foreign state is sought to be enforced by action in his own state, its courts, whose duty it is to protect its own citizens, will treat it as a nullity, because, by the laws of war, the courts of one belligerent have no power over the subjects of the other.

All judicial proceedings as between such enemies are suspended. "*Silent leges inter arma.*"

But it is said that by the Act of 1790 such judgments, when properly authenticated, are to have the same force and effect in the state where sued on as by law or usage they have in the state where rendered; and *Hawkins v. Filkins*, 24 Ark. 286, and other cases cited in same volume, are cited as holding that the judgment of the circuit courts of that state during the war were valid.

Hawkins v. Filkins was between citizens resident there during the war. The defendant was served, and the parties, as we understand the case, were both present when judgment was rendered. This judgment might well stand on the principles we have laid down as the act of a *de facto* government over its own citizens within its jurisdiction.

So far as the opinion is based on broader grounds, it is overruled in *Penn v. Tolleson*, 26 Ark. 546, and *Thompson v. Mankin*, 26 Ark. 586, wherein it is held that "the governments established by the states in rebellion were never recognized by the United States as legal state governments," and that "service made during the rebellion by a Confederate court is not binding on the party to appear, and any decree or judgment thereon is a nullity."

We have been referred to the cases of *White v. Cannon*, 6 Wal. 443, and *Pepin v. Lackmeyer*, 45 N. Y. 27, in support of the power of these state courts after secession to render valid judgments.

In *White v. Cannon* the ordinance of secession of the state was passed January 26, 1861, and the judgment was rendered January 31, 1861, between parties before the court. It was suggested by counsel that the judgment was rendered after the passage of the ordinances of secession, and therefore void.

To this the court say: "That ordinance was an absolute nullity, and of itself, alone, neither affected the jurisdiction of that court nor its relation to the appellate power of this court." The mere passage of such ordinance did not abolish the court as a court of the lawful government.

Pepin v. Lackmeyer related to the validity of a judgment rendered in a state court of Louisiana, in New Orleans, in February, 1863, after the city had been under federal authority for nearly a year, between resident citizens. The military commander had, on taking possession of the city, in May, 1862, issued a proclamation announcing "that civil causes between party and party will be referred to the ordinary tribunals," under which the state court continued to hear and determine causes. The President's proclamation exempts from its provisions such parts of the insurgent states as became within the Union lines.

Blackwell v. Willard, 65 N. C. 555, is a late case bearing upon the validity of certain judicial proceedings, during the rebellion, in a suit pending prior to the war, wherein a citizen of New York was complainant. Under an order of court, a sale of real estate had been made in November, 1860, on deferred payments. The purchase money was paid, after the war commenced, to the clerk and master of the court. The court, instead of suspending proceedings in the case, made an order at the Fall term, 1861, that the master had authority to receive payment of such deferred payments as the purchaser may desire to pay. It was held that "the relations between the plaintiffs and their counsel were terminated by war, and the steps taken afterward in the cause did not affect them. They had a good claim against the defendants before the war began; their remedy was suspended, and was revived on the return of peace." It was further said, the order of the court after war existed, and the payment to the clerk and master of the court, are no bar to a recovery."

It is said that the appearance of defendants' attorney on the final trial gave the court jurisdiction; that there was no revocation of his authority, and that the war did not work such revocation.

Numerous cases may be cited to show that agencies in private affairs, relating to property of an alien enemy, within the agent's country, so far as their acts are not in violation of the non-intercourse regulations, and are for the benefit of his principal, or protection of his property, are not

revoked. We have been referred to none, however, showing that such agencies extend beyond the protection and care of his principal's property and interests, to the creating new obligations. The attorney in this case might well have continued his employment, for the purpose of saving the rights of his clients; but it can hardly be claimed that it was within the scope of his employment to waive his clients' right to have the action suspended, and, by his appearance, confer a power upon the court, which otherwise it did not possess, to bind them by a judgment, when war made it impossible for him to have a day in court. If, as we conclude, this court had no power over a citizen of an adhering state, pending the war, the consent of defendants' attorney, under prior employment, could not confer such power.

The judgment of the superior court is affirmed.

SCOTT, Chief Judge, DAY, and WRIGHT, JJ., concurred.

ASHBURN, J., dissented.

COURT OF APPEALS OF VIRGINIA.

(To appear in 27 Va.)

NEGLIGENCE.—INJURY TO INFANT BY RAILROAD COMPANY.—RUNNING TRAIN UPON STREET OF CITY.—PROOF OF DAMAGE BY LOSS OF ARM.

NORFOLK AND PETERSBURG R. R. Co. v. ORMSBY.

1. The terms negligence and ordinary care are correlative terms. Ordinary care depends on the circumstances of the particular case, and is such care as a person of ordinary prudence under the circumstances would have exercised.
2. A railroad company running its cars through a populous street of a city, on which many children live, must omit nothing which can be done by the company and its agents to prevent injury to children on the street.
3. A child two years and ten months old cannot be capable of contributory negligence, so as to relieve a railroad company from liability for its own negligence.
4. Negligence of the parent or guardian of an infant child injured by a railroad car cannot constitute contributory negligence on the part of the child, so as to exonerate the company.
5. In an action for injuries involving the loss of an arm, plaintiff may introduce evidence to show what must be the effect of his injuries in disqualifying him from pursuits requiring two hands.

THIS was an action of trespass on the case in the corporation court of Norfolk, brought in December, 1869, by Charles Ormsby, an infant, by his next friend, against the Norfolk and Petersburg Railroad Company. The declaration set out:—

For that whereas the defendants, before and at the time of the committing of the grievances hereinafter mentioned, to wit, on the 30th day of August, in the year 1869, were the owners of a certain railroad, to wit, of a railroad from the said city of Norfolk, which connects with the South-side railroad, at or near the city of Petersburg, and of a certain engine

and cars, then under the care and management of certain servants of the said defendants; nevertheless the said defendants, by their said servants, so carelessly, negligently, and improperly behaved and conducted themselves in and about the management, control, and direction of the said engine and cars, that the same, by and through the default, carelessness, negligence, and improper conduct of the said servants of the said defendants, then with great force and violence were driven and struck against the said plaintiff, by means whereof the right arm of the plaintiff was so fractured and injured that it became necessary to amputate the same, and the said arm was thereupon amputated, and he was otherwise greatly wounded, bruised, and injured, and so remained for a long space of time; and also by means of the premises the plaintiff was so maimed as to be disabled for the remainder of his life. To the damage of the said plaintiff of \$30,000.

The issue was made up on the plea of "Not guilty;" and the cause came on to be tried at the May term of the court, 1872, when the jury found a verdict in favor of the plaintiff, and assessed his damages at \$8,000. The defendants thereupon moved the court to set aside the verdict and grant them a new trial, on the ground that the verdict was contrary to the law and the evidence. But the court overruled the motion, and rendered judgment according to the verdict. To this opinion of the court the defendants excepted; and the court certified the following as the facts proved upon the trial:—

That on the morning of the last day of August, 1869, between the hours of nine and ten o'clock, the agents of the defendants carried two flat cars loaded with lumber, from its depot in the city of Norfolk down its track on Widewater Street, in the said city, and left them in front of McCullough's lumber yard, on said street, to be unloaded, and one other flat car loaded with lumber, further down the said street, and left the same in front of Murdock Howell's lumber yard, on said street, to be unloaded; that the said flat cars remained at the places at which they were respectively left, until between four and five o'clock in the afternoon of that day, when the said agents of the defendants left the said depot with a locomotive and five box cars in front of it, loaded with freight for the Boston steamer, the purpose being to carry the said box cars down Widewater Street to Town Point, near the foot of said street, to be unloaded, and to gather up and carry back to the depot the three flat cars that had been left on said street loaded with lumber during the forenoon. When the said locomotive and box cars reached McCullough's lumber yard, the two flat cars left there in the morning having been unloaded, were coupled on the said train, the said agents with the locomotive, five box cars and two flat cars then proceeded on in the direction of Murdock Howell's lumber yard, on said street, for the purpose of coupling on to the flat car left at that point in the forenoon, to be unloaded. That on the said train, when it left the depot, there were G. W. Alsop, the engineer; a fireman, whose name was not given; J. T. Roberts, the yard master; James Pierce, switchman, and a colored train hand named Smith Vass. That the said J. T. Roberts was stationed on a brake-wheel two feet above the top of the fifth box car, being the next one to the flats, and the said Pierce and the said Vass were stationed on the foremost flat car, after they were

coupled on at McCullough's lumber yard. That while the train moved from the depot down Widewater Street, the bell on the engine was rung continually by the fireman, until the train reached Market Square, a point on the said track between the depot and Howell's lumber yard, and at that point the fireman left the train, by the permission of the engineer; and from that point by the engineer until the train reached the flat car at Howell's lumber yard. That when the said front of the said train reached the United engine-house, situated on said street, at a point about two hundred and twenty feet from the flat car in front of Murdock Howell's lumber yard, it was moving at a rate of speed between two and three miles an hour. That about that point a signal was given to the engineer by the yard master, Roberts, to slacken the speed of the train in order to couple on to the flat car in front of Howell's lumber yard, which signal was heard and obeyed by the engineer. That at the time the moving train came in contact with the stationary flat car, the engine was running with steam from the boiler shut off, and was propelled solely by the steam in the dry pipe; the train was moving very slowly; the engineer on the train used all the appliances known to his business, to make the train move as slow as possible in order to couple. It is not possible to move a train slower than one mile per hour, it is very difficult to move at all at this rate; ordinarily, when using every appliance, the rate is one and one half miles per hour; that during the whole time that the said train was moving from the depot westward, to collect the flats left on the track in the forenoon, the engine bell was rung, a man was on the top of one of the box cars, and two men on the flat car at the extremity of the train, by way of lookout, to give signals to the engineer in charge of the engine; that the man on the box car blew a whistle as he deemed necessary, and that these were the precautions usual and customary when the defendants were moving a train on said street. That the said James Pierce and Smith Vass, who were stationed on the front flat car attached to the moving train, and whose business it was to couple the stationary flat car to the moving train, attempted to effect the said coupling, but failed to do so, because the coupling-pin, which was left on the stationary car in the forenoon, had by some means been removed during the day. That the said Pierce, when the moving train was within two cars off, or seventy-five or eighty feet of the stationary flat car, discovered that the coupling-pin had been removed, and jumped from the flat car on which he was standing, and ran back to the engine for the purpose of getting another. That it had been customary to leave the coupling-pins on the freight cars, which were detached and left on the track to be loaded or unloaded. That in Portsmouth the coupling-pins left with the cars were so commonly thrown away by mischievous boys, or stolen by negroes, that the train master was put to great inconvenience, and adopted the plan of attaching them permanently to the cars. That when the train struck the stationary car and failed to make a coupling, the said stationary car was driven back on the track about one half of its length, its whole length being from twenty-seven to thirty feet; and if the attempt to couple had been successful, the said stationary flat car would have been driven back not more than three feet. That at the time of the concussion of the moving train with the stationary car, the said stationary car had been discharged of about one half of its load

of lumber; that on the day on which the plaintiff received his injury, some time between ten o'clock, A. M. and two o'clock, P. M., one of the agents of the defendants, F. M. Ironmonger, whose business it was to superintend the railroad track on Widewater Street and attend to the moving of the trains, was passing along said street, and saw a small boy, whom he supposed to be the plaintiff, in rear of the wheel of the said stationary flat car in front of Mr. Howell's lumber yard, and in a very dangerous position, and drove him away from said car in the direction of the residence of Mrs. Ormsby, mother of the plaintiff; that Mrs. Ormsby, the mother of the plaintiff, lived in a tenement on Widewater Street, between the United engine-house and the flat car standing in front of Mr. Howell's lumber yard, being about one hundred and eighty feet distant from the engine-house, and about forty feet distant from the stationary car; that on the afternoon of the last day of August, 1869, about three and a half o'clock, she, Mrs. Ormsby, being sick at the time, having become the mother of an infant about four days before, and her husband being absent from home, directed her servant to mind her children; that the servant took them into the kitchen; that when the servant brought in the dinner, the plaintiff followed her; that she directed the servant to get a basin of water and wash the plaintiff's face; that the plaintiff, hearing her give this direction to the servant, ran to the front door, which opened on Widewater Street; that there were two lower rooms in her house, one immediately in the rear of the other, that the front room was occupied by her as a grocery and the rear room as a sitting-room, that the door opening upon Widewater Street and the door between the two rooms are immediately opposite each other; that at the time she was lying upon a lounge in the back room, which was in a position that enabled her to command a view of the front door; that while the plaintiff was standing in the front door, in full view of the mother, she directed the servant, who had brought the basin of water, to go directly and bring the plaintiff; that the plaintiff hearing this direction to the servant, ran out upon the street; that the servant went immediately after the plaintiff, going out of the back door and through a lane leading to Widewater Street; that the servant was gone not over two or three minutes, and when she returned, brought the plaintiff in her arms, with his right arm mangled and hanging by his side; that the plaintiff at the time of the injury was two years and ten months old, having been born in the month of October, 1866.

At the time the plaintiff ran out the front door on Widewater Street, there were three persons standing in front of the United engine-house, and one other person standing in front of a house three or four doors between Mrs. Ormsby's residence, all being on the north side of the said railroad track; that the last named person was about sixty feet from the said stationary car, looking in the direction of the moving train at the time it came up to the stationary car; that the plaintiff was not seen by any of these persons, or by any of the defendants' agents on the moving train, until the flat car had been in put motion by the said moving train, which was moving westwardly; that then the witness standing west of the said flat car, and looking eastwardly in the direction of the moving train, saw the plaintiff lying about six feet west of and beyond the said flat car, with his arm upon the track and the rest of his body on the north side thereof,

looking as though he had stumbled and fallen and was struggling to get up; that when the plaintiff was first seen by the persons standing in front of the United engine-house, he was being carried around by the wheel of the flat car, which had been put in motion by the moving train, and he was not seen by any of the agents of the defendant until he had been taken from under the wheel and was being carried in the direction of his mother's house by a colored woman; that when the moving train came in contact with the stationary car there was a colored man standing on the said car engaged in throwing off lumber, and the said colored man was not in the employment of the defendants.

That the neighborhood in which Mrs. Ormsby, the mother of the plaintiff, lived, on Widewater Street, was thickly settled, and there were a great many children living in the houses on both sides of Widewater Street in that neighborhood; that the plaintiff's mother had a nurse employed, whose duty it was specially to attend to the plaintiff, and his said mother never permitted him to go on the street; that since the injury was received the plaintiff has been very troublesome, has complained of pain in his breast, and has required constant attention; that after the injury was received, by which the plaintiff's right arm was mangled and nearly severed from his body, it became necessary to amputate, and that it was amputated and removed from the socket at the shoulder; that the loss of the arm is injurious to the plaintiff's health; that it leaves his right lung more or less unprotected, and creates a predisposition to sickness, such as pneumonia, pleurisy, and other pulmonary complaints; that owing to the loss of the arm, the plaintiff's right side will not develop as well as his left, and his general health will be affected; that he cannot engage in manual labor requiring the use of two hands, and in order to make a livelihood he will have to resort to some other employment.

That on the 26th January, 1867, the select and common councils of the city of Norfolk adopted an ordinance in the words and figures following, to wit: "That the Norfolk and Petersburg Railroad Company be and they are hereby authorized and granted the right and privilege to enter upon and lay the track of their road in any and upon such of the streets of this city as the directors of said company may deem fit, proper, and prescribe for their use and purposes, either in the loading or unloading of cars, as well as the transit of cars, engines, and trains, on the express condition, however, that the speed of their cars, engines, or trains shall not, within the limits of the city, exceed a rate of five miles per hour."

That although the defendants were permitted by the said ordinance to run their cars and engines through the streets at a rate of speed not exceeding five miles an hour, the instructions given to all the agents and employees of the road were not to exceed the rate of four miles an hour, and always to ring the bell and to give all the necessary and proper signals above mentioned in passing through the said street; and that the witnesses of the plaintiff, one of whom was sixty feet, and the others about one hundred and eighty feet from the stationary car, watched the train as it moved down the said street, and did not hear the sound of the engine bell, and did not see or hear any signal by those on said train. And these are all the facts proved.

On the trial of the cause the defendants excepted to various opinions and rulings of the court. The first was to the refusal of the court to give to the jury certain instructions asked, and the giving one of them with a modification. They are as follows:—

Instruction No. 1. If the jury believe from the evidence that the defendants were not guilty of negligence, but were exercising ordinary care in the management of their engine and cars at the time of the injury complained of in the plaintiff's declaration, they must find for the defendants.

Instruction No. 2. If the jury believe from the evidence that the plaintiff, at the time the injury complained of was sustained, was only two years and ten months of age, and was permitted by his parents to go on the railroad track of the defendants on Widewater Street, without placing him under the charge of some one capable of taking care of him and protecting him from injury, then the said parents were guilty of negligence and a want of proper care for the child; and such negligence and want of proper care in thus permitting the plaintiff to be exposed to injury on the said railroad track furnishes the same answer to an action by the child for such injury, as would the negligence or other fault of an adult plaintiff; and if the jury further believe from the evidence that the injury complained of in the plaintiff's declaration would not have happened but for such negligence and want of proper care on the part of the parents, then they must find for the defendants.

Instruction No. 3. If the jury believe from the evidence that the plaintiff at time of the injury complained of was so concealed either behind or under the stationary car as not to be visible to the agents of the defendants, and that the said agents of the defendants at the time of the said injury were exercising ordinary care and watchfulness, and the said engine was not running exceeding the rates of one or two miles per hour, then there was not such negligence on the part of the defendants as renders them liable in this action, and the jury will therefore find for the defendants.

Instruction No. 4. The defendants, to maintain the issue on their part, having introduced evidence tending to prove that in the forenoon of the day on which the plaintiff received the injury complained of the defendants sent a flat car loaded with lumber to a point on their railroad track on Widewater Street opposite the lumber yard of Murdock Howell, for the purpose of delivering the said lumber to the said Howell; that in the afternoon of the same day the defendants sent an engine with a train of five box cars and three flats (the box cars being all together next to the engine), from the depot down Widewater Street, for the purpose of collecting the cars on the said street and taking them out to the depot; that the engine was pushing the said train down the said track; that one of the employees of the defendants was stationed upon the top of the rearmost box car to look out for obstructions upon the track, and, if any such obstructions appeared, to notify the engineer; that two train hands of the said defendants were stationed on the rearmost flat car of the moving train for the purpose of coupling on to stationary cars along the track; that the employee of the defendants stationed as aforesaid on the top of the rearmost box car, when the moving train got within about one hundred and eighty feet of the stationary car in front of Murdock Howell's lumber yard, gave a signal to the engineer to slacken his speed for the purpose of

coupling with the said car, which was obeyed by the engineer, and afterwards gave another signal when the moving train had approached very near to the aforesaid stationary car, in order to notify the engineer to run still slower, which signal was also obeyed by the engineer; that the said employee so stationed on the top of the rearmost box car was constantly on the lookout for obstructions upon the railroad track; that he saw none except the stationary car aforesaid; that the train, at a distance of one hundred and eighty feet from the stationary car, was running between two and three miles per hour; that at the time the moving train struck the stationary car it was moving as slowly as it could be moved; that when the train struck the stationary car the shock or concussion was not greater than is usually the case; that the force with which the moving train came against the stationary car was so feeble as to drive the stationary car back not exceeding ten or fifteen feet; that the two employees of the defendants, whose duty it was to make a coupling with the stationary car, failed to do so because some one, while the stationary car was standing on the track in front of Howell's lumber yard, had removed the coupling-pin, and another had to be gotten from the engine before the coupling could be effected; that the bell upon the locomotive was regularly and continuously rung from the time the train left the depot until the train struck the stationary car aforesaid; that the said employee stationed on the top of the rearmost box car, although constantly on the lookout, did not see the plaintiff until after he had received the injury complained of; that the said plaintiff was so concealed at the time, either behind or under the stationary car, as to be wholly invisible to the said employee; that none of the said employees saw the plaintiff until after he had received the injury complained of; and that one of the said employees, whose duty it was to assist in coupling the train to the flat car, jumped from the train about twenty steps above the stationary car and went back to the engine for a coupling-pin; that he, too, was on the lookout for obstructions upon the railroad track, and that he did not see the plaintiff until after he had received the injury complained of; that it was the custom of the said defendants, in running their trains through Widewater Street, to have on their trains a sufficient number of hands to look out for obstructions and guard against accidents, and that on the occasion when the injury complained of was received the said defendants had the usual number of hands on the train, and used the customary precautions against accident.

The court instructs the jury, that if they believe the evidence proves what it tends to prove, the defendants have not been guilty of negligence or want of ordinary care, and therefore are not liable for damages in this suit.

Instruction No. 5. The court instructs the jury, that the plaintiff is not entitled to recover damages for the injury complained of, if they believe from the evidence that the plaintiff's own negligence contributed directly to the injury, although they may further believe from the evidence that the defendants did not use proper care and caution in running their cars at the time said injury was sustained.

Instruction No. 6. The court instructs the jury, that as an infant is chargeable with the negligence of his parents or guardian in permitting him to be exposed to the risk of injury, and is debarred from recovering

damages in the same cases in which he would be precluded from recovering if he were of full age and had been himself guilty of such negligence, the plaintiff in the case is not entitled to recover damages from the injury complained of, if they believe from the evidence that his parents' negligence contributed directly to that injury, although they may further believe from the evidence that the defendants did not use proper care and caution in running their cars at the time said injury was sustained; unless they farther believe from the evidence that the defendants were aware of the said parents' negligence, and failed to use proper care and caution to avoid the injury.

Instruction No. 7. If the jury believe from the evidence that the plaintiff, at the time the injury complained of was sustained, was only two years and ten months of age, and was permitted by his parents to go unattended on the railroad track of the defendants on Widewater Street, then the said parents were *prima facie* guilty of negligence and a want of proper care for the child; and such negligence and want of proper care, in thus permitting the plaintiff to be exposed to injury on the said railroad track, furnishes the same answer to an action by the child for such injury as would the negligence or other fault of an adult plaintiff; and if the jury believe further from the evidence that the injury complained of in the plaintiff's declaration would not have happened but for such negligence or want of proper care, then they must find for the defendants.

Instruction No. 8. The court instructs the jury the plaintiff is not entitled to recover damages for the injury complained of, if they believe from the evidence that the defendants were using ordinary care and caution in the pursuit of their lawful business at the time said injury was sustained.

Instruction No. 9. If the jury believe from the evidence that the injury complained of in the declaration was occasioned by the plaintiff's throwing himself in the way of a moving train of cars belonging to the defendants, and that he was run over before the agents of the defendants having charge of the said train could prevent it, they must find for the defendants.

But the court refused to give the instructions numbered 2, 3, 4, 5, 6, 7, 8, and 9, and gave the instruction number 1, with the following modification:—

Modification of Instruction No. 1. The terms negligence and want of ordinary care are correlative terms. If the defendants are guilty of negligence as alleged in the declaration, the plaintiff is entitled to recover; if the defendants exercised ordinary care, the plaintiff is not entitled to recover. Ordinary care depends on the circumstances of the particular case, and is such care as a person of ordinary prudence under the circumstances would have exercised. For instance, the defendants while running along their road through the country would not be required to take the same care as when passing a crossing where the highway crosses their road,—they must exercise a greater degree of care; and when they enter the city and pass along the streets where many persons are passing, and where there are dwelling-houses on each side of the street, they must exercise greater care. If under all the circumstances of the case, looking

to all the evidence in the case, you believe the defendants exercised such care as a prudent man would have exercised under the circumstances, then the defendants are not liable. But should you believe the defendants guilty of negligence in running their cars, yet if you believe the plaintiff by his negligence contributed to the injury, the defendants are not liable.

To ascertain whether the plaintiff was guilty of negligence you will apply the same rules as to the defendants; if, looking to his age and the circumstances, you think he exercised such care as was reasonably to be expected of a child of that age, then the defendants are liable, though the plaintiff by his act did contribute to the injury. If you believe that the parents of the child did not exercise ordinary care in allowing their child to be on the street without an attendant, yet the defendants are liable; this is an action brought by the child; it is his cause of action, and he is not responsible for the negligence of the parents.

The second exception is as follows:—

The plaintiff, to maintain the said issue on his part, offered to give in evidence to the jury that on the last day of August, 1869, he had been injured by the cars of the defendants running against him on Widewater Street within the limits of the city of Norfolk; to which evidence the defendants, by their counsel, objected as improper to go to the jury, because of the variance between the said evidence and the allegations contained in the declaration. But the court being of opinion that there was no variance, overruled the objection to the said evidence, and permitted the same to go to the jury.

The third exception was as follows:—

The plaintiff, to maintain the issue on his part, introduced a witness, Dr. James D. Galt, to prove that owing to the injury which he had received, and the loss of his arm, he was incapacitated from the pursuit of the ordinary vocations of life which required the use of two hands, and would be compelled to resort to some other means of obtaining a livelihood. To which evidence the defendants, by their counsel, objected as improper to go to the jury. But the court being of opinion that the said evidence was proper, overruled the objection, and permitted it to go to the jury.

Upon the application of the defendants a *supersedeas* was awarded by one of the judges of this court.

The case was elaborately argued in printed notes by *Goode & Chaplain*, for the appellant, and by *Scarburgh, Duffield & Sharp*, for the appellee. MONCURE, P., delivered the opinion of the court.

This is a writ of error and *supersedeas* to a judgment of the court of the corporation of the city of Norfolk, rendered on the 28th day of May, 1872, in an action of trespass on the case, wherein Charles Ormsby, an infant, suing by James Ormsby, his next friend, was plaintiff, and the Norfolk and Petersburg Railroad Company were defendants. The injury complained of in the declaration was, that the defendants so negligently conducted their engine and cars as to strike them with great force and violence against the plaintiff, by means whereof his right arm was so fractured and injured that it became necessary to amputate the same, and it was thereupon amputated, and he was otherwise greatly wounded and in-

jured, and by means of the premises the plaintiff was so maimed as to be disabled for the remainder of his life. Issue was joined on the plea of not guilty, which was tried by a jury; and a verdict was rendered in favor of the plaintiff, whose damages were assessed at \$8,000. Whereupon the defendants moved the court to set aside the verdict and grant a new trial, upon the ground that the verdict was contrary to the law and the evidence. But the court overruled the motion, and the defendants excepted to the opinion of the court, and tendered a bill of exceptions, which was made a part of the record. The facts proved on the trial of the cause were certified by the court; and judgment was rendered in pursuance of the verdict.

On the trial of the cause the defendants excepted to various opinions and rulings of the court, besides the opinion and ruling of the court in overruling their motion for a new trial, and tendered their several bills of exceptions, which were also made a part of the record. To the judgment aforesaid, the defendants applied to a judge of this court for a writ of error and *supersedeas*, which were accordingly awarded. The errors complained of are assigned in the petition for said writ, and are founded on the said bills of exceptions. The case was argued before this court with great ability and learning; and we will now proceed to consider and dispose of the questions presented by the record in the order in which they arise.

First. We are of opinion that the court below did not err in overruling the motion of the defendants to set aside the verdict of the jury and grant a new trial, upon the ground that the said verdict was contrary to the law and evidence.

The defendants contend that the injury complained of in this case did not proceed from any fault or negligence on their part; and that if it proceeded from their neglect at all, there was such contributory negligence on the part of the plaintiff or his parents in regard to the cause of the injury as exonerates them (the defendants) from liability to him therefor. We will consider each of these grounds of defence; and

First, whether the injury proceeded from any fault or neglect on the part of the defendants.

Could the injury have been avoided by the use of any reasonable means which might and ought to have been used by the defendants? We are constrained to say that it could. In running cars propelled by steam along a railroad over the streets of a populous city, where there are a great many children, the greatest care and precaution are necessary, and ought to be used, to avoid danger to human life. The injury complained of in this case was caused by the running of the flat car at Howell's over the plaintiff, who had fallen on the railroad track just beyond the car; and the running of that car over the plaintiff was caused by its being propelled by the engine and moving train before it had been coupled with that train; whereas it ought and might conveniently have been coupled with that train before it was set in motion. The facts are certified, that if the coupling had been done before the flat at Howell's lumber yard was set in motion, the injury would not have occurred; for, in that case, the flat would not have been propelled more than three feet, and so would not have touched the plaintiff, who was "lying about six feet west of and beyond

the said flat car, with his arm upon the track, and the rest of his body on the north side thereof, looking as though he had stumbled and fallen, and was struggling to get up." Whereas, "when the train struck the stationary car, and failed to make a coupling, the said stationary car was driven back on the track about one half of its length, its whole length being from twenty-seven to thirty feet." In consequence of which the flat not only reached the plaintiff lying on the track, but passed over him, and carried him several times around the car wheel. Why was not this connection made? Because there was no coupling-pin then there with which to make it. Why was not one there? It is said that one had been left there with the flat in the morning, as had been the usual practice in such cases, but that somebody had taken it away. Why was not such a probable danger guarded against by fastening the pin to the flat, so that it could not be taken away? or, why was not the precaution used of bringing a pin with the moving train, to be sure of being ready to make the connection at once? It is certified "that in Portsmouth the coupling-pins left with the cars were so commonly thrown away by mischievous boys, or stolen by negroes, that the train master was put to great inconvenience, and adopted the plan of attaching them permanently to the cars." Why was not the same precaution used in Norfolk, where the obvious danger of loss of the pins must have been just as great as in Portsmouth? Again, why was not the obvious precaution used—of making an examination before the stationary flat at Howell's was set in motion, to see if there was anybody or anything under or near the car which could be injured by its being set in motion? This would have taken very little time, and given very little trouble. There were several hands on the moving train, either one of which, without stopping the train, could have made the examination. It may be said that it was not probable there was any person or thing under or near the flat which could be hurt, as nothing was *seen* by those on the train or by the by-standers. Nothing, it seems, was carefully looked for by them. But was it so improbable as to excuse such a want of caution when human life and limb were at stake? A flat had been left standing in the street of a populous city from between nine and ten o'clock in the morning until between four and five o'clock in the afternoon of the day on which the injury complained of was done. Was it strange or extraordinary that the plaintiff, a child only two years and ten months old, should have been found on the track under or near the car then standing just in front of his mother's door, and only forty feet therefrom? A flat left nearly all day in the street might naturally be expected to be a play place for the neighboring children.

We are therefore of opinion that the injury complained of in this case proceeded from the negligence of the defendants, who are therefore liable therefor; unless they can be exonerated from such liability on the ground of contributory negligence. We therefore proceed now to consider:—

Secondly, whether there was such contributory negligence on the part either of the plaintiff or his parents, in regard to the cause of the injury, as exonerates the defendants from liability to him therefor.

In regard to any negligence on the part of the plaintiff himself, it has not been contended, and cannot be, that he was old enough to be guilty of any, or, at all events, that he was guilty of any in this case. And in

regard to any negligence of his parents, or either of them, if such negligence can be imputed to him, about which we will presently inquire, when we come to consider the case upon the instructions, we think it very clear that there was in fact no such negligence on their part. The facts which are certified in the record are conclusive on this subject; and we will not repeat them, as they may be seen by reference to the certificate.

We therefore conclude, on this branch of the subject, that the court below did not err in overruling the motion of the defendants to set aside the verdict, upon the ground that it was contrary to the law and evidence.

Second. We are of opinion, that the court did not err in refusing to give the instructions asked for by the defendants, numbered 2, 3, 4, 5, 6, 7, 8, and 9; nor in giving instruction numbered 1, with certain modifications.

The second instruction is objectionable on two grounds: First, the plaintiff was not "*permitted* by his parents," as the instruction assumes, "to go on the railroad track of the defendants on Widewater Street, without placing him under the charge of some one capable of taking care of him and protecting him from injury;" and, secondly, the said instruction imputes to the infant plaintiff the assumed negligence of his parents; for which, even if there had been any such negligence, as in fact there was not, the infant plaintiff would not have been responsible. On this question, as to the liability of infants for the neglect, imputed to them, of their parents, there appears to be much conflict in the cases, many, and perhaps most of which were cited in the arguments of the learned counsel. But without following them through their review of the cases, we deem it sufficient to say, that we concur in the principle of the case of *Lynch v. Nurden*, 1 Ad. & El. N. S. 29; 41 Eng. Com. Law R. 422, and others of that class; which decide that the neglect of parents and guardians is not imputable to infant children and wards in such cases; and that we do not concur in the principle of the case of *Hartfield v. Roper*, 21 Wend. R. 615, and others of that class, which decide the contrary.

The third instruction is objectionable, because it was calculated to mislead the jury, and was apparently contradictory. Though the plaintiff might not have been actually visible to the agents of the defendants, he might have been seen by them, certainly, if they had looked for him, as they ought to have done. In other words, they ought to have made sure, as they might have done, that there was no person under or behind the stationary car when they set it in motion. And besides, they ought to have coupled the moving train with the stationary car before they set the latter in motion; in which case they would have guarded against all injury to persons visible or invisible.

The fourth instruction is objectionable, for reasons already given in regard to the first assignment of error.

The fifth instruction is objectionable, because it imputes negligence to the plaintiff, of which, from his tender years, he was not capable.

The sixth and seventh instructions are objectionable, for reasons already stated, because they hold the plaintiff responsible, by imputation, for the supposed negligence of his parents.

The eighth instruction embodies a general truth which seems to be unobjectionable in itself; but it is clearly embraced in the first instruction as modified by the court.

The first instruction, as modified by the court, is unobjectionable, and embodies all the law which seems to apply to the case, or to be necessary to enable the jury to decide it properly.

Third. We are of opinion that the court below did not err in overruling the objection of the defendants on the ground of the supposed variance mentioned in their "bill of exceptions number two;" being of opinion that there was no such variance.

Fourth. We are of opinion, that the said court did not err in overruling the objection of the defendants to the evidence mentioned in their "bill of exceptions number three."

Upon the whole, we are of opinion, that there is no error in the judgment of the court below, and that it ought to be affirmed.

Judgment affirmed.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

LIABILITY OF CORPORATION SUCCEEDING ANOTHER CORPORATION FOR TORTS COMMITTED PRIOR TO SUCCESSION.

NEW BEDFORD RAILROAD CO. v. OLD COLONY RAILROAD CO.

By St. 1874, c. 55, the Old Colony Railroad Company was authorized to purchase the rights, franchise, and property of the Middleborough and Taunton Railroad Corporation, and the latter was authorized to convey to the former its franchises and property, rights, easements, privileges, and powers, and thereupon the former corporation was to "be subject to all the duties, liabilities, obligations, and restrictions to which said last named corporation may be subject." *Held*, that the Old Colony Railroad Company, upon the completion of the purchase and conveyance, became directly liable in an action of tort for damage occasioned by the prior neglect of the Middleborough and Taunton Railroad Corporation.

TORT. The declaration was as follows:—

"And the plaintiff says that it was, at the time of the acts below set forth, the owner, and operating as common carrier of persons and freight, a railroad for the conveyance of passengers and freight; and that said railroad formed a junction with the railroad of the Middleborough and Taunton Railroad Company, and at said junction the track of said last named railroad was connected with the track of the plaintiff's railroad by means of a switch, and it became, and was, by the provisions of law and the agreement of said railroad companies, the duty of the said Middleborough and Taunton Railroad Company to have the care and custody of said switch, and to so arrange the same that the trains of the plaintiff could at any and all proper and reasonable times pass said switch in safety, and so that the line of the track of the plaintiff's railroad should be continuous and unbroken at the place of said junction; but the said Middleborough and Taunton Railroad Company negligently and carelessly managed and controlled said switch, so that upon the approach of a passenger train of the plaintiff upon its said road, and while the plaintiff was using due care in the management of its said road and train, the said train was violently

thrown from the track at said junction, by reason of the said switch being misplaced by said Middleborough and Taunton Railroad Company and its servants and agents, and the engine and cars of the plaintiff were thereby greatly injured, and the track of the plaintiff torn up and destroyed, and the passengers and other persons upon said train received grievous injuries, and the plaintiff has been obliged to expend large sums of money in repairing said track, engine, and cars, and in compensating said passengers and persons, and paying them the damages to which they were legally entitled for said injuries, and has been subjected to other serious damages, burdens, liabilities, and expenses by reason of said carelessness and negligence of the said Middleborough and Taunton Railroad Company. And by the provisions of the statute of 1874, chapter 55, the said Middleborough and Taunton Railroad Company was authorized to convey its franchises, property, and rights to the defendant, and, since the acts above set forth, has conveyed and assigned, in accordance with the provisions of said statute, to the defendant, all its franchises and property, and all the rights, easements, privileges, and powers which had been granted to said Middleborough and Taunton Railroad Company, and, by virtue of the provisions of said act, the defendant is liable to compensate the plaintiff for said negligence and misconduct of the Middleborough and Taunton Railroad Company in this action.

The defendant filed a demurrer to the declaration, assigning the following causes therefor:—

“1. That said declaration does not state a legal cause of action substantially in accordance with the rules contained in the Gen. Sts. c. 129.

“2. That the matters set out in the plaintiff's declaration are insufficient in law to enable it to maintain its action.

“3. That as a matter of law the defendant is not liable by the provisions of the St. of 1874, c. 55, for the tortious acts of the Middleborough and Taunton Railroad Company, or those of its agents or employees prior to said act, or prior to any conveyance of its property, under the provisions of said act, to the defendant.

“4. That as matter of law, by the provisions of said act, the defendant is not in any event directly liable to the plaintiff's action; nor is it, as a matter of law, in any way liable to the plaintiff's action by the provisions of said act.”

The case was reserved by Colt, J., on the demurrer, for the consideration of the full court.

W. W. Rice, for the defendant.

G. A. Torrey, for the plaintiff.

COLT, J. The St. of 1874, c. 55, authorizes the defendant corporation “to purchase the rights, franchise, and property of the Middleborough and Taunton Railroad Corporation,” and gives to the latter corporation, upon such purchase, power to convey to the Old Colony Railroad Company “its franchises and property, and all the rights, easements, privileges, and powers granted to it.” It also declares that upon such conveyance the defendant corporation shall “have and enjoy all the rights, powers, privileges, easements, franchises, and property of said Middleborough and Taunton Railroad Corporation, and be subject to all the duties, liabilities, obligations, and restrictions to which said last named corporation may be subject.”

This action is to recover damages for a tortious act of the Middleborough and Taunton Railroad Corporation, for which it was liable previously to the time of the purchase; and the questions raised by the demurrer are, whether the defendant is liable for that act, and, if so, whether an action can be maintained directly against it, or must be first brought against the other corporation.

The answer to these questions depends upon the intention of the legislature to be deduced from the terms of the statute and the manifest purpose of the act. The language is broad enough to place the defendant in all respects in the position of the other corporation, upon the conveyance and assignment provided for. It is equivalent to an amalgamation of the two; all the franchises, privileges, and powers are transferred, without reservation; not merely the franchise to own and manage a railroad, but the franchise of being a body politic, with rights of succession, of acquiring, holding, and conveying property, and of suing and being sued by its corporate name. It puts out of the reach of creditors all property liable to attachment to satisfy claims, either in contract or tort. It practically terminates the corporate existence of the selling corporation, except, perhaps, so far as such existence may be necessary in order to hold and distribute the consideration received for the sale, or to meet the requirements of the statute which prolongs the life of all corporations for three years after dissolution, for the purpose of enabling them to close their concerns. Gen. Sts. c. 68, § 36. It operates as a dissolution of the corporation by force of the statute and of the assent manifested by the sale. *Lauman v. Lebanon Valley Railroad*, 30 Penn. St. 42.

In view of these results, it would be a narrow construction to hold that when the statute subjects the purchasing corporation "to all the duties, liabilities, obligations, and restrictions" of the other, it only intended to impose those obligations which the corporation owed the public under its charter and the laws of the commonwealth, and that the property transferred was only that by which it served the public in the exercise of its franchise. In the absence of express provision, it cannot be inferred that it was the intention of the act to impair claims of third parties for existing liabilities, or to shorten the time within which the remedy must be pursued. The question is not whether the statute compels the creditor to accept the defendant corporation as a new debtor against his will, or an injured person to resort to a stranger for satisfaction, but whether it empowers the creditor or the person injured to resort, if he chooses, in the first instance, to the corporation, which, by the terms of the statute, is made liable to him. And we are of opinion that it does, and that the privity necessary to support this action is created by the statute and the purchase and conveyance under it.

Demurrer overruled.

SUPREME COURT OF THE UNITED STATES.

[OCTOBER TERM, 1876.]

EXPRESS COMPANY. — NEGLIGENCE OF RAILROAD COMPANY TRANSPORTING GOODS FOR. — RELATION OF EXPRESS COMPANY AND RAILROAD COMPANY.

PRESIDENT, ETC. OF THE BANK OF KENTUCKY v. ADAMS EXPRESS CO.
PLANTERS' NATIONAL BANK v. SAME.

1. While a common carrier may restrict by contract his liability in matters not inconsistent with public policy, he cannot legally contract against liability for the negligence of himself, his agents, or servants.
2. A railroad company which provides a place for, and carries on its trains messengers of an express company, becomes the agent of the express company, notwithstanding the servants of the railroad company are not under the control of the express company.
3. A common carrier has no power to constitute another person or corporation the agent of his consignor or consignee. He can only employ a subordinate agency.
4. A stipulation that an express company will not be liable for the loss of a package by fire does not relieve the company from liability for loss by fire caused by the negligence of the railroad company transporting its messenger.
5. While the consignor of the express company may sue the railroad company for the loss of packages by its negligence, such right comes through the contract between the express and railroad companies.
6. As to whether a railroad company is liable, as a common carrier, to an express company when the latter by its messenger retains the custody of the package, *Quere*.

THE opinion of the court below will be found in 1 Am. L. T. R. N. S. at page 451.

The opinion of the court was delivered by Mr. Justice STRONG.

The defendants in each of these cases are an express company engaged in the business of carrying for hire, money, goods, and parcels from one locality to another. In the transaction of their business they employ the railroads, steamboats, and other public conveyances of the country. These conveyances are not owned by them, nor are they subject to their control any more than they are to the control of other transporters or passengers. The packages intrusted to their care are at all times, while on these public conveyances, in the charge of one of their own messengers or agents. In conducting their business they are associated with another express company called the Southern, and the two companies are engaged in carrying by rail through Louisiana and Mississippi, to Humboldt, Tennessee, and thence over the Louisville and Nashville Railroad to Louisville, Kentucky, under a contract by which they divide the compensation for carriage in proportion to the distance the package is transported by them respectively. Between Humboldt and Louisville both companies employ the same messenger, who is exclusively subject to the orders of the Southern Express Company when south of the northern boundary of Tennessee, and to the orders of the defendants when north of that boundary.

Such being the business and occupation of the defendants, they are to

be regarded as common carriers, and in the absence of stipulations to the contrary, subject to all the legal responsibilities of such carriers.

On the 26th day of July, 1869, the Southern Express Company received from the Louisiana National Bank at New Orleans, two packages, one containing \$13,528.15, for delivery to the Bank of Kentucky, Louisville, and the other containing \$3,000, for delivery to the Planters' National Bank of Louisville, at Louisville. The money belonged to the banks respectively to which the packages were sent. When the packages were thus received, the agent of the Southern Express Company gave a receipt or domestic bill of lading for each, of which the following is a copy (the two differing only in the description of the consignees and in the amount of money mentioned) : —

" Domestic Bill of Lading.

" SOUTHERN EXPRESS COMPANY, EXPRESS FORWARDERS.

" No. 2. \$13,528.15.

July 26, 1869.

" Received from Lou. Nat. Bank, one package, sealed, and said to contain thirteen thousand five hundred and twenty-eight dollars and fifteen cents.

" Addressed Bank of Kentucky, Louisville, Ky. Freight coll."

" Upon the special acceptance and agreement that this company is to forward the same to its agent nearest or most convenient to destination only, and then to deliver the same to other parties to complete the transportation, such delivery to terminate all liability of this company for such package; and also that this company are not to be liable in any manner or to any extent for any loss, danger, or detention of such package, or its contents, or of any portion thereof occasioned by the acts of God, or by any person or persons acting or claiming to act in any military or other capacity in hostility to the government of the United States, or occasioned by civil or military authority, or by the acts of any armed or other mob or riotous assemblage, piracy, or the dangers incident to a time of war, nor when occasioned by the dangers of railroad transportation, or ocean or river navigation, or by fire or steam. The shipper and owner hereby severally agree that all the stipulations and conditions in this receipt shall extend to and enure to the benefit of each and every company or person to whom the Southern Express Company may intrust or deliver the above described property for transportation, and shall define and limit the liability therefor of such other companies or person. In no event is this company to be liable for a greater sum than that above mentioned, nor shall it be liable for any such loss, unless the claim therefor shall be made in writing, at this office, within thirty days from this date, in a statement to which this receipt shall be annexed.

" Freight coll.

" For the company :

" SHACKLEFORD."

Across the left-hand end of said receipt was the following printed matter : —

" Insured by Southern Express Company for ——— to ——— only except against loss occasioned by the public enemy.

" For the company —

" Insurance, \$——."

The bills of lading were sent to the consignees at Louisville.

Having thus received the packages, the Southern Express Company transported them by railroad as far as Humboldt, Tennessee, and there delivered them to the messenger of the defendants (who was also their

messenger) to complete the transportation to Louisville, and to make delivery thereof to the plaintiffs. For that purpose the messenger took charge of them, placing them in an iron safe, and depositing the safe in an apartment of a car set apart for the use of express companies, for transportation to Louisville. Subsequently, while the train to which the car containing the packages was attached was passing over a trestle on the line of the Louisville and Nashville Railroad, and while the packages were in charge of the messenger, the trestle gave way during the night. The train with the express car was thrown from the track, and the car with others caught fire from the locomotive and was burned, together with the money in the safe. The messenger was rendered insensible by the fall, and he continued so until after the destruction was complete. There was some evidence that some of the timber of the trestle seemed decayed.

Upon this state of facts the learned judge of the circuit court instructed the jury that "if they believed the package was destroyed by fire, as above indicated, without any fault or neglect whatever on behalf of the messenger of defendants, the defendants have brought themselves within the terms of the exceptions in the bill of lading, and are not liable." And again, the court charged: "It is not material to inquire whether the accident resulted from the want of care, or from the negligence of the Louisville and Nashville Railroad Company and its agents, or not." And again: "But when he (the common carrier) has limited his liability so as to make himself responsible for ordinary care only, and the shipper to recover against him is obliged to aver and prove negligence, it must be his negligence, or the negligence of his agents, and not the negligence of persons over whom he has no control. If in his employment he uses the vehicles of others, over which he has no control, and uses reasonable care, that is, such care as ordinarily prudent persons engaged in like business use in selecting the vehicles, and if the loss arises from a cause against which he has stipulated with the shipper, he shall not be liable for the same unless it arises from his want of care, or the want of care of his employees." At the same time the learned judge instructed the jury as follows: "Without, therefore, deciding whether or not the evidence adduced in the case tends to establish any want of reasonable or ordinary care on the part of the Louisville and Nashville Railroad Company, I instruct you that such evidence is irrelevant and incompetent, and that you should disregard it, that is, give no more effect to it than if it had not been adduced."

These extracts from the charge, to all of which exception was duly taken, exhibit the most important question in these cases, which is, whether the stipulations of the carriers' receipt or bill of lading relieved them from responsibility for the negligence of the railroad company employed by them to complete the carriage. The circuit court was of opinion, as we have seen, that they did, and practically instructed the jury that under the modified contract of bailment the defendants were liable for loss by fire only to the extent to which mere bailees for hire, not common carriers, are liable; that is, that they were responsible only for the want of ordinary care exercised by themselves or those who were under their control. With this we cannot concur, though we are not unmindful of the ability with which the learned judge has defended his opinion.

We have already remarked, the defendants were common carriers.

They were not the less such because they had stipulated for a more restricted liability than would have been theirs had their receipt contained only a contract to carry and deliver. What they were is to be determined by the nature of their business, not by the contract they made respecting the liabilities which should attend it. Having taken up the occupation, its fixed legal character could not be thrown off by any declaration or stipulation that they should not be considered such carriers.

The duty of a common carrier is to transport and deliver safely. He is made by law an insurer against all failure to perform this duty, except such failure as may be caused by the public enemy or by what is denominated the act of God. By special contract with his employers, he may, it is true, to some extent, be excused, if the limitations to his responsibility stipulated for are, in the judgment of the law, reasonable, and not inconsistent with sound public policy. It is agreed, however, he cannot by any contract with his customers relieve himself from responsibility for his own negligence or that of his servants, and this because such a contract is unreasonable and contrary to legal policy. So much has been finally determined in *Railroad Company v. Lockwood*, 17 Wall. 357. But can he by a contract made with those who intrust property to him for carriage and delivery, a contract made at the time he receives the property, secure to himself exemption from responsibility for consequences of the negligence of a railroad company or its agents not owned or controlled by him, but which he employs in the transportation? This question is not answered in the *Lockwood case*. It is raised here, or rather the question is presented, whether a common carrier does relieve himself from the consequences of such negligence by a stipulation that he shall not be liable for losses by fire.

The exception or restriction to the common law liability introduced into the bills of lading given by the defendants, so far as it is necessary to consider it, is "that the express company are not to be liable in any manner or to any extent for any loss or damage or detention of such package or its contents, or of any portion thereof, occasioned by fire." The language is very broad, but it must be construed reasonably, and, if possible, consistently with the law. It is not to be presumed the parties intended to make a contract which the law does not allow. If construed literally, the exception extends to all loss by fire, no matter how occasioned, whether occurring accidentally or caused by the culpable negligence of the carriers or their servants, and even to all losses by fire caused by wilful acts of the carriers themselves. That it can be operative to such an extent is not claimed. Nor is it insisted that the stipulation, though assented to by the shippers, can protect the defendants against responsibility for failure to deliver the packages according to their engagement, when such failure has been caused by their own misconduct or that of their servants or agents. But the circuit court ruled the exception did extend to negligence beyond the carriers' own, and that of the servants and agents appointed by them and under their control; that it extended to losses by fire resulting from the carelessness of a railroad company employed by them in the service which they undertook, to carry the packages; and the reason assigned for the ruling was that the railroad company and its employees were not under the control of the defendants.

With this ruling we are unable to concur. The railroad company, in transporting the messenger of the defendants and the express matter in his charge, was the agent of somebody, either of the express company or of the shippers or consignees of the property. That it was the agent of the defendants is quite clear. It was employed by them and paid by them. The service it was called upon to perform was a service for the defendants, a duty incumbent upon them, and not upon the plaintiffs. The latter had nothing to do with the employment. It was neither directed by them, nor had they any control over the railroad company or its employees. It is true the defendants had also no control over the company or its servants, but they were its employers; presumably they paid for its service, and that service was directly and immediately for them. Control of the conduct of an agency is not in all cases essential to liability for the consequences of that conduct. If any one is to be affected by the acts or omissions of persons employed to do a particular service, surely it must be he who gave the employment. Their acts became his, because done in his service and by his direction. Moreover, a common carrier who undertakes for himself to perform an entire service has no authority to constitute another person or corporation the agent of his consignor or consignee. He may employ a subordinate agency, but it must be subordinate to him, and not to one who neither employs it nor pays, nor has any right to interfere with it.

If, then, the Louisville and Nashville Railroad Company was acting for these defendants, and performing a service for them, when transporting the packages they had undertaken to convey, as we think must be concluded, it would seem it must be considered their agent. And why is not the reason of the rule, that common carriers cannot stipulate for exemption from liability for their own negligence and that of their servants and agents, as applicable to the contract made in these cases as it was to the facts that appeared in the case of *Railroad Company v. Lockwood*? The foundation of the rule is, that it tends to the greater security of consignors, who always deal with such carriers at a disadvantage. It tends to induce greater care and watchfulness in those to whom an owner intrusts his goods, and by whom alone the needful care can be exercised. Any contract that withdraws a motive for such care, or that makes a failure to bestow upon the duty assumed extreme vigilance and caution more probable, takes away the security of the consignors and makes common carriage more unreliable. This is equally true, whether the contract be for exemption from liability for the negligence of agencies employed by the carrier to assist him in the discharge of his obligations, though he has no control over them, or whether it be for exemption from liability for a loss occasioned by the carelessness of his immediate servant. Even in the latter case he may have no actual control. Theoretically he has; but most frequently when the negligence of his servant occurs he is not at hand, has no opportunity to give directions, and the negligent act is against his will. He is responsible, because he has put the servant in a place where the wrong could be done. It is quite as important to the consignor, and to the public, that the subordinate agency, though not a servant under immediate control, should be held to the strictest care, as it is that the carrier himself and the servant under his orders should be.

For these reasons we think it is not admissible to construe the exception in the defendants' bills of lading as excusing them from liability for the loss of the packages by fire, if caused by the negligence of the railroad company to which they confided a part of the duty they had assumed.

There are other reasons of weight which deserve consideration. Express companies frequently carry over long routes, at great distances from the places of designation of the property carried, and from the residence of its owners. If in the course of transportation a loss occurs through the want of care of managers of public conveyances which they employ, the carriers or their servants are at hand. They are best acquainted with the facts. To them those managers of the public conveyances are responsible, and they can obtain redress much more conveniently than distant owners of the property can. Indeed, in many cases, suits by absent owners would be attended with serious difficulties. Besides, express companies make their own bargains with the companies they employ, while they keep the property in their own charge, usually attended by a messenger. It was so in the present case. The defendants had an arrangement with the railroad company, under which the packages of money, inclosed in an iron safe, were put into an apartment of a car set apart for the use of the express company; yet the safe containing the packages continued in the custody of the messenger. Therefore, as between the defendants and the railroad company, it may be doubted whether the relation was that of a common carrier to his consignor, because the company had not the packages in charge. The department in the car was the defendants' for the time being; and if the defendants retained the custody of the packages carried, instead of trusting them to the company, the latter did not insure the carriage. *Miles v. Cattle*, 6 Bingham, 743; *Towers v. The Utica & Syracuse R. R. Co.* 7 Hill, N. Y. 47; Redfield on Railways, sec. 74.

Now, can it be a reasonable construction to give to the contract between the defendants and the plaintiffs, that the former, who had agreed to carry and deliver the packages at Louisville, reserved to themselves the right to employ a subordinate carrier, arrange with him that he should be responsible only for ordinary vigilance against fire, and by that arrangement relieve themselves from what without it would have been their clear duty? Granting that the plaintiffs can sue the railroad company for the loss of the packages through its fault, their right comes through their contract between it and the defendants. They must claim through that. 6 How. 381. Had the packages been delivered to the charge of the railroad company, without any stipulation for exemption from the ordinary liability of carriers, it would have been an insurer both to the express company and to the plaintiffs. But as they were not so delivered, the right of the plaintiffs to the extremest constant vigilance during all stages of the carriage is lost, if the defendants are not answerable for the negligence of the railroad company, notwithstanding the exception in their bills of lading. We cannot close our eyes to the well known course of business in the country. Over very many of our railroads the contracts for transportation of goods are made, not with the owners of the roads, nor with the railroad companies themselves, but with transportation agencies or companies which have arrangements with the railroad companies for the carriage. In this manner some of the responsibilities of common

carriage are often sought to be evaded; but in vain. Public policy demands that the right of the owners to absolute security against the negligence of the carrier, and of all persons engaged in performing the carrier's duty, shall not be taken away by any reservation in the carrier's receipt, or by any arrangement between him and the performing company.

It has been urged on the part of the defence that, though the contract does not attempt to exempt, and could not have exempted the express company from liability for loss occasioned by the neglect of itself or its servants, yet, when it is sought to charge the company with neglect it must be such as it is responsible for upon the general principles of law, and that upon these principles no one is responsible for damage occasioned by neglect unless it be the neglect of himself, his servants, or agents. The argument mistakes, we think, when it asserts that upon general principles of law no one is responsible for the consequence of any neglect except his own or that of his agents or servants. Common carriers certainly are, and for very substantial reasons. These defendants, it is agreed, were common carriers, and they remained such after the exception in their receipt. If it be said the exception reduced responsibility to such an extent as to make them liable only for such neglect as fastens a liability upon persons who are not common carriers, the answer is, such an averment assumes the very thing to be proved. And even if the argument were sound, the question would still remain whether the railroad company employed by the defendants to effect the carriage is not properly to be regarded as their agent, though not under their control. That question we have already considered.

Again, it is urged that though the defendants remained common carriers notwithstanding their contract, their responsibility was limited by their receipt to that of an ordinary bailee for hire. And as such bailee is not held liable for the neglect of persons over whom he has no control, it is argued that these defendants are not liable for the negligence of the railroad company. This also assumes what cannot be admitted. Although we are told all the authorities agree that when a common carrier has by special contract limited his liability, he becomes, with reference to that particular transaction, an ordinary bailee — a private carrier for hire — or reduces his responsibilities to those of an ordinary bailee for hire; yet we do not find that the authorities assert that doctrine, if by the phrase "that particular transaction" is meant the undertaking to carry. Certainly those to which we have been referred do not. We do not deny that a contract may be made which will put a common carrier on the same level with a private carrier for hire, as respects his liability for loss caused by the act or omissions of others. The consignor may by contract restrain him, may direct how and by what agencies he shall carry. Under such an arrangement he may become a mere forwarder, and cease to be a carrier. But what we have to do with in these cases is, whether the contract proved has that operation. We have already said we think it has not. The exception in the bills of lading has sufficient to operate upon without being a cover for negligence on the part of any person engaged in the service undertaken by the carriers. It exempts the defendants from responsibility for loss by fire caused by the acts or omissions of all persons who are not agents or agencies for the transaction.

That is a large restriction, and beyond that, in our judgment, the exception in the present case does not extend.

To the opinion we have thus expressed we find direct support in the case of *Hooper v. Wells, Fargo & Co.* 27 Cal. 11. There an express company had undertaken to transport gold dust and bullion from Los Angeles to San Francisco, and deliver to address. The receipt for the property contained the following stipulation: "In no event to be liable beyond our route, as herein receipted. It is further agreed, and is part of the consideration of this contract, that Wells, Fargo & Co. are not to be responsible except as forwarders, nor for any loss or damage arising from the dangers of railroad, ocean, or river navigation, fire, &c., unless specially insured by them and so specified in this receipt." In the course of the transportation the messenger of the carriers, who had the property in charge, took it on board a steam-tug for the purpose of placing it on a steamer bound to San Francisco. On the way to the steamer the boiler of the steam-tug exploded, in consequence of carelessness of its officers, and the gold dust and bullion were thereby lost. The steam-tug did not belong to the express company, nor was it or its officers under their control. Yet the court adjudged that the managers and employees of the steam-tug were, in legal contemplation, the managers and employees of the carriers, and that the restrictive clause in the receipt did not exempt the carriers from liability for loss occasioned by the carelessness of those employees. To the same effect is the case of *Christensen v. American Express Company*, 15 Minn. 270; and the case of *Machu v. London & Southwestern Railway Company*, 3 Exch. 415, though arising under the carrier acts of 11 George 4, and 1 William 4, is very analogous. The statute declared that the carrier should be liable to answer for the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his employ. The court considered that all parties actually employed in doing the work which the carrier undertook to do, either by himself or his servants, were to be regarded as his servants within the meaning of the act. Baron Rolfe said, the right as against the carriers arises, not from the relation of master and servant, but by virtue of the contract into which they have entered to deliver the goods. This was said in answer to an argument like the one relied upon in this case, that the relation of master and servant could not exist between the carriers and the servants of a sub-contractor.

The other objections urged against the charge given by the court below to the jury require but brief notice.

We find no error in what the circuit judge said upon the question, whether the bills of lading with the exceptions constituted the contract between the parties. The charge in this particular is justified by very numerous authoritative decisions: *York County v. Central Railroad Company*, 3 Wall. 107; *Grace v. Adams*, 100 Mass. 505; *Wells v. The Steam Nav. Co.* 2 Comstock, 204; *Dorr v. New Jersey Steam Nav. Co.* 1 Kernan, 485; 6 How. 344; 3 Wall. 107; 6 Blatchf. 64; *Kirkland v. Dinsmore*, 62 N. Y. 161.

Nor was there error in the instruction given respecting the iron safe. Taken as a whole it was correct.

The charge covered the whole case, and except in those particulars in which we have indicated our opinion that it was erroneous, we find no just reason to complain of it.

But for the errors we have pointed out, new trials must be awarded.

The judgment in each case is reversed, and the record is remitted with directions to award a

Venire de novo.

SUPREME COURT OF ALABAMA.

[DECEMBER, 1876.]

OF THE POWER OF A RECEIVER TO ISSUE CERTIFICATES OF INDEBTEDNESS.

MEYER v. JOHNSTON.

A court of equity has power in a proper case to allow the issuing by a receiver of negotiable certificates of indebtedness creating a first lien upon the property in his hands.

MANNING, J., delivered the opinion of the court.

On the day after the appointment of the first receiver, he petitioned the chancellor for leave to borrow \$90,000, or such other sum as his honor might prescribe; and the chancellor thereupon, and in vacation, made an order authorizing him to borrow \$150,000 on certificates of indebtedness which should have priority of payment over any other claim, out of the proceeds of sales of any property in the receiver's possession. And the authority thus granted not having been used, the two receivers subsequently petitioned the chancellor for leave to borrow, instead, \$700,000, to be used in purchasing rolling-stock and putting the railroad and its appurtenances in repair. The chancellor thereupon made an order authorizing them to do so, directing what portion of the amount should be expended in rolling-stock (about \$450,000); prescribing, in accordance with suggestions in the petition, the form of the certificates to be issued therefor, making them negotiable, and interest thereon payable semi-annually at the office of the New York Guaranty and Indemnity Company, and undertaking to charge these certificates upon the railroad and its appurtenances and equipments as a prior lien, having precedence of liens created by the first and other prior mortgages. The receivers were also authorized to sell the certificates at ninety cents on the dollar; and it seems to have been intended that the proceeds should be used, in part, in enlarging and completing the work beyond what was necessary for the preservation of the property.

Counsel for the first and other early mortgage creditors, alarmed by this decree, object to and protest against having their liens on the property of the company, existing by virtue of instruments solemnly executed long before the receiver's certificates were thought of, postponed in favor of charges created by the latter; and they deny that the chancellor has rightfully the power to give such precedence to new creditors. The chancellor has not in his opinion discussed this question, or presented any arguments or authorities in support of the disputed power. But this has been ably done by the counsel for appellees.

A claim of very large authority in the courts has been made in argument under this head; and the subject is a very important one, and sufficiently new to require an investigation at some length.

1. "The object sought by the appointment of a receiver," says Mr. Kerr, in his work on Receivers, "may be generally described to be, to provide for the safety of property, pending the litigation which is to decide the right of litigant parties." P. 3. "The duty of the court, upon a motion for a receiver, is merely to protect the property in the mean time for the benefit of those persons to whom the court at the hearing of the cause, when it will have before it all evidence and materials for a determination, shall think it properly belongs." *Ib.* p. 6. *Blakeney v. Dufaur*, 15 Beav. 42. In *Gardner v. L. G. & D. Railway Co.* Law Rep. 2 Ch. App. 201, an appeal was taken to the court of appeal in chancery, from an order of the vice-chancellor, appointing the general manager and the secretary of the company, on the application of a creditor with a lien, managers and receivers of the company's "undertaking" or railroad business. The lords justices discharged the order, saying: "When the court appoints a manager of a business or undertaking, it, in effect, assumes the management into its own hands; for the manager is the servant or officer of the court, and upon any question arising as to the character or details of the management, it is the court that must direct and decide. The circumstance that, in this particular case, the persons appointed were previously the managers employed by the company" (as was one of the persons appointed in the case before us), "is immaterial. When appointed by the court, they are responsible to the court, and no orders of the company, or of the directors, can interfere with this responsibility. Now, I apprehend that nothing is better settled than that this court does not assume the management of a business or undertaking except with a view to the winding up and sale of the business or undertaking. The management is an *interim* management; its necessity and its justification spring out of the jurisdiction to liquidate and to sell; the business or undertaking is managed and continued in order that it may be sold as a going concern, and with the sale the management ends." P. 212. This is stated by Cairns, Lord Justice, as the rule in such matters. And in addition (pertinently of views hereinafter to be presented), he says: "When parliament, acting for the public interest, authorizes the construction and maintenance of a railway, both as a highway for the public and as a road on which the company may themselves become carriers, . . . it confers powers and imposes duties and responsibilities of the largest and most important kind, . . . upon the company which parliament has before it, and upon no other body of persons. . . . It is impossible to suppose that the court of chancery can make itself, or its officer, without any parliamentary authority, the hand to execute these powers; and all the more impossible when it is obvious there can be no real and correlative responsibility for the consequences of any imperfect management. It is said that the railroad company did not object to a manager. This may well be so. But in the view I take of the case, the order would be improper, even if made on the express agreement and request of the company."

A court of equity in this country may, in certain cases, interpose, and appoint a receiver, when a company, receiving tolls and income more than

sufficient to pay the expenses of an economical administration, refuses to apply the surplus to the payment of a judgment or mortgage creditor. *The Covington Drawbridge Co. v. Shepherd*, 21 How. 112, presents an instance of the exercise of this power. The receiver in that case was also directed, out of the *tolls* and *income* of the bridge, to keep it in repair. In *Stevens et al. v. Davison et al.* 18 Grattan, 819, a board of directors, some of whom "had been concerned in the fraudulent issue of a very large amount of spurious stock, greatly exceeding in amount the lawful stock of the company," on the very day when their term of office was to expire, and the annual meeting of the stockholders, which the directors failed to call, should have been regularly held, made a lease of the railroad, of which they were directors, for a period of ten years, at an inadequate rent, without authority from the charter to do so, and in violation of a by-law adopted by the stockholders. Some of the lawful stockholders filed a bill to have the lease declared void, and for other relief; and a receiver was appointed to take possession and control of the road and operate it under directions contained in the decree. The court of appeals of Virginia, reviewing the proceedings, said: "While for the reasons assigned in *Gardner v. The L. C. & D. Railway Co.* Law Rep. 2 Ch. App. 201, a court of chancery will be reluctant to appoint a receiver to take charge of and manage a railroad, it is competent to do so, when such a course is indispensable to secure the rights of the legitimate stockholders, and to prevent a failure of justice. And the court is of opinion that, under the circumstances of this case, it was proper for the court to appoint a receiver to take charge of and manage the railroad until it can be ascertained, by a proper inquiry to be made in this cause, who are the legitimate stockholders of said company, to whom the custody and management of said railroad should be committed."

The foregoing instances have been selected as illustrative of the authority of courts of equity to take charge of the management of property in litigation. Their interference by receivers and managers in such cases, and for such purposes, is easily vindicated. In doing so, they put forth a power merely incidental and subsidiary to their functions of ascertaining and enforcing the rights of the persons concerned in the subject matter in controversy. They take and preserve the property, in order to uphold and maintain the rights of creditors and others therein, and to enforce the obligation of contracts. It is in the exercise of the judicial function only that a court obtains jurisdiction between litigant parties, of the cause in which it is authorized to take such control, for the preservation of the property involved. And we are not aware of any principle of law, or element of wise policy, which would justify such court, after so getting possession, in laying aside its judicial character, and engaging, however hopeful the scheme, in the completion of unfinished undertakings, and in raising money for this purpose, as the parties themselves could not, by setting up liens which shall displace other and older liens, without the consent of the persons to whom they belong. The objections to such transactions are, that they are necessarily, to some extent, speculative; that they arbitrarily unsettle interests founded on the most solemn contracts; and that the court, in conducting them, abdicates its judicial function, and exercises another more akin to that of a bureau of an executive department of the interior.

We have been furnished, by the industry of counsel for complainants below, with imperfect manuscript reports of the cases of *Southerland, Trustee, &c. v. The Lake Superior Ship Canal Railroad & Iron Co.* (before Judge Longyear, United States District Judge for the Eastern District of Michigan, presiding in the circuit court at Detroit), and *Hyde v. The Sodus Point, &c. R. R. Co.* (before a judge of the supreme court of New York, at Brooklyn). In each of these cases the court seems to have authorized its receiver to raise money by certificates of indebtedness, which should constitute a first lien on the property, and to complete therewith the company's unfinished work. In what manner, in the former case, the court obtained jurisdiction of the cause, by whom, for what purpose, and how it was brought before the court, we are not informed. It only appears, by a copy of Judge Longyear's order, of June, 1872, that "the receiver, Knox, was appointed . . . under the first mortgage," and that after notice to the parties, and counsel for them had been heard, "it being made to appear to the court that it is for the best interest of all concerned in said ship canal and said property, real and personal, that said canal should be finished and made ready for use as speedily as practicable, and that it is necessary and expedient that said receiver should issue certificates of indebtedness for the purpose of said speedy construction ;" therefore he was authorized by the court to issue such certificates, payable July 1st, 1873, and bearing interest at the rate of ten *per cent.* a year, to the amount of \$500,000, which should constitute a first lien on said canal and property, and have priority of payment over any debt previously created, *and to execute and deliver a mortgage trust deed thereof, and of the franchises and rights of the company, to a trustee, to secure payment of said certificates* accordingly. It was further provided that, in case these should not be paid at maturity, the receiver should, upon application to the court and on its order, deliver over all the property and effects embraced by said deed *to the trustee, to be by him sold to pay said certificates.* The receiver was also authorized to sell said certificates, at a discount not exceeding twenty-five *per cent.*, or to borrow money by hypothecation of them. The court, by this conveyance to a trustee, put the property even out of its own control, and appears to have disposed of it, as if invested itself with a sort of seigniorial title that enabled it to supersede existing rights of others therein, and to have exercised legislative power in authorizing the borrowing of money without regard to usury laws.

The only other information which our manuscript of this case contains is, that the first series of these certificates of indebtedness not having been paid, the trustees under the receiver's mortgage trust deed applied to the court, in 1874, for leave to sell, to enable him to pay them ; that a contest was thereupon inaugurated with other parties interested, and that the judge declined to grant the leave applied for, until the supreme court of the United States should decide a case pending in it, which seemed to him to involve some of the questions on which his decision would depend. Not having a full report of this case, we do not comment on it further, except to say that, as presented to us, we do not recognize in it any principle which would justify a chancellor of this state in assuming the authority (seemingly absolute) which Judge Longyear exercised in that case ; and

we do not perceive in the result of it any reason for desiring that a court of equity should be clothed with such authority.

In *Hyde v. The Sodus Point Railroad Co. et al.*, a judgment creditor, to an amount between \$500 and \$600, filed his complaint in the nature of a bill, in December, 1873, against that company and the Union Trust Company, on behalf of himself and such other creditors as should join in the proceedings. He set forth that an execution on his judgment had been returned unsatisfied; that the property of the Railroad Company was of great value; that it was subject to a first mortgage trust deed executed to the Union Trust Company as trustee, to secure the payment of bonds to the amount of \$700,000, which had been issued; that the trustee had not taken possession of the property, as it lawfully might have done; that, by reason of disputes among the officers and managers of the company, its property was being wasted, and seized for taxes and various other claims, real or alleged; that bankruptcy proceedings against it were threatened; and that there was great danger, unless the court should take charge of the railroad, that its operations would cease and the property be wasted, and the claims of plaintiff and other *bond fide* creditors be lost; wherefore, plaintiff prayed that a receiver be appointed; that the company and its officers be enjoined from interfering; that the property, profits, and earnings of the railroad company, properly applicable to payment of plaintiff and other creditors with liens, be so applied, and that the property should be sold as the court should direct; to which last prayer no response was made, or perhaps desired. With the complaint, and in the same cause, were filed affidavits (sworn to before plaintiff's complaint was filed) of several persons, holders and agents of the holders of first mortgage bonds, to the amount of \$649,000 of the \$700,000 issued; in which affidavits affiants say, "their bonds constitute the first existing lien on the property of the company; that the interest on them is in arrears and unpaid; that proceedings for a foreclosure have been postponed in the hope that some arrangement might be made which would prevent the sacrifice usually incident to such proceedings, and preserve the rights of the subsequent *lienors*; that in September, 1873, the Union Trust Company suspended payment, and shortly afterwards a receiver of its effects was appointed, whereby a further difficulty existed in the way of a foreclosure; that they are advised that the appointment of a receiver would not prejudice the right of the trustee to commence proceedings hereafter to a foreclosure; and that they believe it would be a benefit to all the creditors of the R. R. Co. to have a receiver appointed for the purposes mentioned in plaintiff's complaint." Thereupon, it seems (though our manuscript does not contain the order), Sylvanus J. Macy, one of the holders of first mortgage bonds, was appointed receiver. On the 15th of January, 1874, he made a very lucid report of the condition of the property, specifying the bridges and other parts of the road that were wretchedly out of order, and insisting on the importance of making repairs, and of constructing, at one terminus, wharves, piers, and other fixtures to facilitate transfers of cargo to and from vessels, and at the other terminus, connections with other railroads; in order to do which work, and other things, he asked for authority to issue certificates of indebtedness to the amount of \$125,000, which should constitute a first lien on the property of the company. This au-

thority was granted on the 16th day of January, 1874, and on the 20th was confirmed, after consideration by the court of an affidavit (of which we have no copy) by the President of the Union Trust Company. and argument by Mr. Peckham, in opposition.

It is obvious that the holders of the first mortgage bonds, in their own right, or as agents, representing nearly all of them, got up this case in conjunction with Hyde, a judgment creditor, as plaintiff. And, since no one opposed the motion, except (apparently) the Union Trust Company (trustee in the mortgage deed made for their benefit), and no appeal was taken, it is probable that the opposition was *pro forma* rather than real. At any rate, it was obvious to all parties that it would be beneficial to all to have the work completed even on those terms. And, if the holders of the first mortgage bonds were willing that the certificates should create a lien prior to their own, it seemed pretty certain that the other creditors would not consider that they had any cause for opposing them.

We cannot regard this unreported amicable suit as an authority of weight concerning the jurisdiction of a court of equity to take upon itself the completion of unfinished enterprises, and the raising of money for the purpose, by charging the property with liens that shall override other and older ones, against the consent of the persons entitled to them.

Another case to which our attention has been called on this point is that of the Alabama and Chattanooga Railroad. Dilapidated, mismanaged, in litigation in several distinct courts, subject to independent managers, deriving authority from different sources, charged with a first mortgage debt of more than \$5,000,000, with interest to a large amount unpaid, which debt the entire property, upon a sale thereof, would not fetch money enough to pay, and daily diminishing in value, while its other large debts were daily growing larger, the trustees under the first mortgage deed filed their bill in the circuit court of the United States, at Mobile, against the company and the trustees in the second mortgage deed, and several other defendants, and prayed that the court would take jurisdiction of, settle, and determine the various matters of dispute and the rights of all persons concerned, and sell the property, or dispose of the same for their benefit, according to their respective rights therein, and, in the mean time, take charge of, preserve, repair, and operate the railroad, with its appurtenances, by receivers, whom it was asked to appoint, "with full power to borrow money, and to render effectual the orders and directions of the court, . . . [and] to cause the property and effects of said corporation to be properly . . . protected, improved, and administered . . . and to be put in such condition, as to title and possession, as well as in every other respect, that the said railway, and the property incident thereto, may not be sacrificed," &c. This bill, with its exhibits and many affidavits in support of it, before being filed, was presented to Mr. Justice Bradley, of the supreme court of the United States, on the 26th day of May, 1872, and application made for an injunction and the appointment of receivers, according to the prayer of the bill. But he ordered that the application be heard before the circuit court of the United States, sitting in equity at Mobile (of which he was circuit justice), on the 20th of June following, and "that a copy of the bill and affidavits, and notice of the

hearing aforesaid, be served on the defendants at least ten days before the hearing."

"On the 20th of June, 1872, the motion for receivers and for injunction was duly submitted to said circuit court . . . in open court, and held for order and decree in vacation." But, urgent as the case was, not until the 26th of August — and not then until "the parties interested" consented, after an amendment of the bill bearing date August 23d, 1872, withdrawing all offensive imputations, was made — did Mr. Justice Bradley make the order so much relied on in this cause, and which has attracted so much attention from the legal profession. The order recites that the "railroad and connecting works and other property . . . are rapidly deteriorating in value, and being wasted, scattered, and destroyed, whereby the security of the first mortgage bond holders, and the interest of all other persons concerned in said property, are subject to great hazard and danger of entire sacrifice." And then the order proceeds as follows: "And whereas, in the present condition of said property, it is impossible, without great sacrifice, to dispose of the same in any manner; and whereas, it has been proposed and agreed by the parties interested, that all further opposition to the proceedings in bankruptcy against said company . . . shall be withdrawn, and that the said proceedings shall be affirmed; and that all other proceedings for the appointment of receivers in the several state and district courts shall be discontinued, so that the proceedings in this suit shall have full effect and operation, without undue embarrassment, and that a receiver or receivers shall be appointed in this cause to take charge of said property, and *put the same into proper condition* for its preservation and disposition, for the mutual benefit of all parties interested therein;" therefore, receivers are appointed and "authorized to put said railroad and other property in repair, and to complete any incompleting portions thereof, and to procure rolling stock, machinery, and other necessary things for operating the same to the best advantage, so as to prevent the said property from deteriorating, and to save and preserve the same for the benefit and interest of the said first mortgage bond holders, and all others having an interest therein. It is further ordered that all moneys which may be raised by said receivers by loan, or which may be advanced by them for the purposes aforesaid, not exceeding the sum of \$1,200,000, shall be a first lien, prior to all others, on the said railroad and other property, and to be paid, before the first mortgage bonds, out of the proceeds of said property." See *Stanton v. A. & C. R. R. Co.* 2 Woods, 506.

It is argued for complainants below (appellees) that the consent spoken of was only to the appointment of receivers, and not to their borrowing of money by giving such liens. This was not, it seems to us, the understanding of Justice Bradley. For in going on, after making the appointment of the receivers, by virtue of the agreement, to specify their duties, it is not to be supposed that he either did not know, or did not regard what was the understanding and agreement of the parties in that respect. And when we note what were the duties they were expected to perform, it is perceived at once that, in order to discharge them, the receivers must have a large amount of money. Under this idea, when he proceeds, in the next paragraph, to speak of the liens to be created, Justice Bradley does not

expressly authorize the receivers to raise money, but, assuming that they would, of course, have that to do, he says: "All moneys which *may be raised* by said receivers by loan, or which *may be advanced* by them," . . . "not exceeding," &c., "shall be a first lien," &c. The language seems to imply that, having once said that the appointment was made by agreement of "the parties interested," the learned justice did not think it important to repeat this in the several successive paragraphs in which he spoke of what the receivers were to do. Besides, the prayer of the bill was for receivers "with full power to borrow money," to have the property *improved*, &c. And the parties, consenting to their appointment, must be understood as consenting to their being appointed "with full power to borrow money," according to the application, which, obviously, could not be done for an insolvent corporation, except by creating liens on its property that should have precedence of the first mortgage. But however this may be, Justice Bradley took care not to allow any lien to the certificates of indebtedness, which were to be issued by the receivers, payable ten years afterwards, "until (as the order says) the same shall be countersigned by a majority of the trustees for the first mortgage bond holders; without which countersigning, they shall not be entitled to the priority and lien aforesaid." This countersigning would itself secure such priority, even if the lien of the first mortgage bond holders should have to be displaced to that extent in favor of subsequent mortgagees, according to the case of *Pierce v. Emery*, 32 N. H. 521.

We have examined and analyzed these cases thus particularly, because the proposition involved in the discussion is of immense importance, and they are understood as establishing it. It will be seen that in all of them first mortgagees were the actors, and that in the one last considered, express consent was given by "the parties interested," or, if not, that it was exacted of the trustees of the first mortgagees; wherefore, this case cannot be relied on as affording support to the proposition. Let us now return to the examination of it upon principle.

We presume it may be considered as settled that a railroad company, which has executed a first mortgage of its railroad, constructed and to be constructed, and thereby raised a large amount of money to aid in the building of it, cannot afterwards give a security to another, even to one who is engaged to build an unfinished part, that shall have precedence of the older one. In *Dunham v. Railway Company*, *supra*, this question was presented (very favorably, on behalf of a contractor) to the supreme court of the United States. "Authorities are cited," says Justice Clifford, "which seem to favor the supposed distinction, and the argument in support of it was enforced at the bar with great power of illustration; but, suffice it to say that, in the view of this court, the argument is not sound, and we think the weight of judicial determination is greatly the other way." And in *Galveston Railroad Co. v. Cowdrey et al.* 11 Wall. 480, the same court, by Bradley, J., says: "On the part of Robert Pulsford, it is objected that the decree does not give him a priority on that portion of the road which was laid with his iron. He contends that he is entitled to this, first, because, when the mortgages of complainants were executed, it was not in existence and could not have been conveyed thereby, and can only be embraced therein on the principle of equitable estoppel, which

is rebutted when it comes in conflict with a superior equity ; secondly, his capital, applied to the road, conserved it and rendered it capable of being operated, which it would not have been otherwise ; hence, on the principle adopted by the civil and maritime laws, of awarding priority to the last creditor who furnishes necessary repairs and supplies to a vessel, he is entitled to priority. The counsel for Pulsford has furnished us with a very ingenious and learned argument on these points, but we cannot yield to their force." Then follows, on the first point, what we have hereinbefore quoted from this opinion, on the operation of a mortgage upon a railroad *to be constructed*, after which Justice Bradley says : " As to the other point, giving priority to the last creditor for aiding to conserve the thing, all that it is necessary to say is, that the rule referred to never has been introduced into our laws, except in maritime cases, which stand on a particular reason." A ship far from home, in distress, and without resource, must perish, and perhaps her crew with her, if a bottomry bond, then given for repairs and supplies, shall not have precedence of other liens upon the vessel. But the court does not consider a railroad on *terra firma* so beyond the reach of help from those who own or are concerned in it as to justify the adoption, in such a case, of the rule relating to a ship abroad and about to perish.

If the railroad company itself, the corporation created by the state to build, equip, and operate a work useful to the public, though belonging to the company, cannot, when its enterprise is about to fail, and its labor and expenditures to be lost, give to those who shall then come to its aid, and help to complete it, obligations which, like those given by the master of a vessel abroad and in distress, shall have priority over others previously contracted, what prerogative of a court of equity entitles the chancellor to step in and do so, instead of the company ?

The company may not do so, because, holding that contracts should be inviolable, the law will not permit the obligation of them to be impaired. The Constitution of the United States inhibits even a state from doing an act which shall have that effect. And certainly a court, which is a portion only of the government of a state, cannot have power which is denied to the state in convention assembled. If, therefore, the action of the chancellor in this cause goes to the extent of taking the property of the defendant corporation into his hands for the purpose, through his appointees, of completing an unfinished work, or of enlarging or improving a finished one, beyond what is necessary for its preservation, and, to that end, of raising money by charging the railroad and its appurtenances with liens which are to have priority over older ones without the consent of the holders of these, he has passed beyond the boundaries of a chancellor's jurisdiction. In our opinion, no such power is vested or resides in any judicial tribunal.

Nor can we conceive how a mortgagor, by anything that might be inserted in a second or other subsequent mortgage (as is that upon which complainants rely), could confer on a court or chancellor the power to supersede rights created by an earlier mortgage. We may suppose that, by a provision in a first or any mortgage, it might be stipulated that, upon the happening of a certain default or delinquency, the mortgagees should be entitled to apply to a court of equity, and have persons, de-

nominated receivers, appointed to manage a business or undertaking, or to carry a work on to completion, under its direction. Yet how could this, though ever so amply expressed, impose on the court the duty, or clothe it as a court with the capacity to do so? It is within its province, in aid of its judicial functions, to exercise "an *interim* management" of a "going concern," with a view to the sale thereof, or during the pendency of a controversy in which the rights of conflicting claimants are to be determined. It cannot take upon itself the execution simply of schemes or projects of either private or public utility. The provision supposed would, perhaps, create interests in the mortgagees which a court of equity might take cognizance of and protect. The persons, though appointed by it, in consequence of the stipulation, to manage the business or undertaking, or to carry the work forward to completion, no matter by what name called, whether receivers or something else, would (we apprehend) be, properly, not officers of the court acting only under its direction, but trustees for the parties, having such powers and duties as are legally created by the contract, and as are recognized and imposed by the law relating to trustees.

But does it, therefore, follow that a chancellor, who takes property in litigation, by his receivers and managers, under the charge of the court, is incompetent to raise money, when necessary for the expense of its *custody and preservation*, by issuing certificates of indebtedness, which shall constitute first liens? This is a question not by any means identical with the one we have just examined.

1. Of course property, in that condition, must be taken care of by the court, and the expense of this must be paid. Generally, this is done out of the income. But, if there be no income, or it is inadequate, and it be necessary for the conservation of the subject matter of the suit, that money be used, the expenses thus incurred must then fall on the *corpus* of the property. This often happens when, after possession taken by the court, the property is sold and becomes a money fund, to be distributed among creditors, which is then itself the *corpus* of the estate. The receiver may also be authorized by the court to borrow money, if necessary, in anticipation of the sale, to be reimbursed with interest out of the proceeds of the property when sold. And we suppose a receiver of approved integrity and responsibility would have little trouble in borrowing money, to a moderate amount, in such a case, upon his note or due-bill as a receiver. Or if a receiver has, under the direction of the court, taken moneys and used them in the performance of his duties as a receiver, which moneys should not have been so taken, and were not subject to the claim of complainants, but belonged to other parties, the court, afterwards ruling that these moneys should not have been so taken and applied, will, for rectification of the error, order the amount, with interest, to be returned to the parties entitled thereto, out of the proceeds of the sale of the property with which it has been identified, with priority of payment over the oldest mortgage debt. This was done by Justice Swayne in *Cowdrey v. Railroad Company*, in the circuit court of the United States at Galveston, in respect to moneys which the district judge had erroneously ordered that the receiver should take and use, according to a manuscript copy furnished us of Justice Swayne's opinion.

Matters of this nature are between the court and the receiver. The transactions are founded on the property in the hands of the court to be sold, and which will not be allowed to pass out of its power without being sold, except on a compromise between the parties, by which all the expenses chargeable thereon shall be paid. And in reference to the expenses, the parties have an opportunity of canvassing and objecting to any that are improper, either when the accounts of the receiver are passed upon, or, if previously authorized by the court, when the application for such authority was heard and acted on. For they are entitled to be heard in respect to them.

Is this the limit beyond which a court of chancery may not go in such a matter in any case? It was not necessary, perhaps, that the question of the power of a court to authorize the issue of first lien certificates of indebtedness, to enable a receiver to raise the money he might need, should be decided before the introduction of railroads. But these properties, with their appurtenances, vast in extent and value, yet very perishable if unused and neglected, existing as the estates of private individuals associated into corporations, but essentially public works, in whose operations the public at large and the state are concerned, when drawn into litigation, must be dealt with by the courts according to the nature and circumstances of the subject. And any one can understand that the best and cheapest mode of conserving a railroad may be by operating trains on it, and keeping it in repair for their use. If it were not for the public quality belonging to it, for the injury that would be done to the interests of whole communities that have become dependent on a railroad for accommodation in a thousand things, the chancellor might say to the parties most interested: Unless you furnish means for the protection of this property, which does not itself afford an adequate income for the purpose, it may become a dilapidated and useless wreck. But the inconvenience and loss, which this would inflict on the population of large districts, coupled with the benefit to parties who, perhaps, could not take care of themselves, of preventing the rapid diminution of value, and derangement and disorganization that would otherwise result, seem to require (not for the completion of an unfinished work, or the improvement, beyond what is necessary for its preservation, of an existing one — but to keep it up, to conserve it as a railroad property, if the court has been obliged to take possession of it) that the court should borrow money for that purpose, if it cannot otherwise do so in sufficiently large sums, by causing negotiable certificates of indebtedness to be issued constituting a first lien on the proceeds of the property, and redeemable when it is sold or disposed of by the court.

2. Weighty objections, we know, may be alleged against such a transaction. It may be said: The property does not belong to the court or the receiver; it is in their hands only while proceedings are pending to determine the respective rights of parties litigant; what title can any instrument made by them transfer in that which belongs to others? Perhaps the correct reply would be: True, the property is in the keeping of the chancellor to be taken care of, but also to be sold; and out of the proceeds the expenses of taking care of it must be paid. The certificates may not follow the property out of the court. But they constitute a charge upon it in the particular cause enforceable in this court, and must

be satisfied or provided for before the property, or the proceeds of it after the sale, shall pass out of its control. The certificates are not debts of the company, but of the receivers, backed by the pledged faith of the court that the property, on the proceeds of which they are charged, is in its possession, subject to be, and that it will be, disposed of by it for the payment of them. This results from the fact that they are but a substitute for common methods by which money is raised for the use of a receiver in a particular cause, a mode of appropriating, in advance, a portion of the value of the property, in order to enable the court to save a greater value thereof from destruction. Hence no chancellor should permit them to be issued without the utmost circumspection; and as they are used for urgent present needs, and are to be redeemed when the litigation is ended, they should not be issued in excess of the need, nor — although made negotiable that they may be more available — be sent out of the country for circulation abroad like mortgage bonds. Such a limited scope is all that is necessary for the certificates to have. By enlarging it, the character which their origin should stamp upon them would be changed, and it will become impossible to preserve the value of older securities.

It may also be said, such a power will be abused. Rash or facile chancellors may be persuaded to issue more certificates than are necessary for the mere conservation of the property, and, when out, they must all be redeemed; else the whole scheme of raising money in this manner fails, and the court is brought into disrepute. All power may be abused. But in the first place, no receiver ought to be appointed, in any such case, except to "prevent fraud, save the subject of litigation from material injury, or rescue it from threatened destruction." *Baker v. Backus*, 32 Ill. 79; *Voshell v. Hynson*, 26 Md. 92. Nor should the appointment of a receiver be made except upon a bill filed praying it, and after answer thereto, "unless the necessity be of most stringent character." *Leddel v. Starr*, 4 C. E. Green (N. J.), 159; *Voshell v. Hynson*, *supra*; *Sanford v. Sinclair*, 8 Paige, 372; *Gibson v. Martin*, Ib. 481; *Blondheim v. Moore*, 11 Md. 365.

The issue of negotiable certificates of indebtedness is a matter hardly less important than the appointment of receivers, and should not be authorized by the court, except after full notice to the parties interested, when this can be given, and ample opportunity allowed for them to be heard. The urgency for the issue of such certificates can rarely be so great, as is that for the appointment of a receiver. A detailed statement ought also to be made out specifying the sums needed, and for what they are needed, and proof be adduced of the correctness of such statement, and of the necessity that the money be raised. A receiver is required, in presenting his accounts to be passed, to state clearly the items. And in like manner, when he asks authority to create, in advance, a large debt against the property by which money is to be put into his hands, he ought to show the particulars constituting the sum before he is allowed to raise it as well as be held to account for its proper application. A disregard of these rules might lead to intolerable abuse. Finally, the case, in our opinion, ought to be one of great urgency, in which the court should appoint a receiver to manage and operate a railroad.

3. Upon the whole, however, it seems necessarily to result, from the

nature of such property, and the capacity and duty of courts of equity to "adapt their decrees to all varieties of circumstances which can arise, and adjust them to all the peculiar rights of all parties in interest," that if a large railroad and its appurtenances are in the hands of a receiver to be preserved and operated, the court having charge thereof must possess the power, after notice to and hearing of the parties interested, to allow the issue, even of negotiable certificates of indebtedness creating a first lien, when this is necessary to raise money for the economical management and conservation of the property, until it shall be disposed of. The pressure upon the courts in various portions of the country to exercise such authority, and the consent or acquiescence of first mortgagees and others in its exercise, are persuasive that the power must exist.

Reversed and remanded for further proceedings, in accordance with this opinion.

SUPREME COURT OF THE UNITED STATES.

[JANUARY, 1877.]

COMMON CARRIER. — BAILOR AND BAILEE. — DELIVERY OF GOODS TO
OWNER CONTRARY TO BILL OF LADING.

HENTZ v. THE IDAHO.

A common carrier may show, as an excuse for non-delivery of goods pursuant to his bill of lading, that he has delivered the goods upon demand to the true owner.

MR. JUSTICE STRONG delivered the opinion of the court.

The libellants claim damages against the steamer for the non-delivery of one hundred and sixty-five bales of cotton, part of a shipment of two hundred bales for Liverpool, made by Thomas W. Mann, and consigned to the order of James Finlay & Company. After the shipment the libellants purchased the cotton from Mann, and the ship's bill of lading therefor was indorsed by him over to them. On the arrival of the steamer at Liverpool thirty-five bales were delivered to Finlay & Company, but the remaining one hundred and sixty-five were delivered to Baring Brothers & Company, in pursuance of an order from William J. Porter & Company, of New York. Such a delivery was not in accordance with the stipulations of the bill of lading, but it is attempted to be justified for the reason that Porter & Company were the true owners of the cotton, and as such had a right, superior to that of the shippers, to control its delivery. In considering the worth of this defence it is necessary to inquire whether the law permits a common carrier to show, as an excuse for non-delivery pursuant to his bill of lading, that he has delivered the goods upon demand to the true owner. Upon this subject there has been much debate in courts of law and some contrariety of decision.

In Rolle's Abridgment, 606, title Detinue, it is said, "if the bailee of goods deliver them to him who has the right to them, he is, notwithstanding

ing, chargeable to the bailor, who in truth has no right," and for this 9 Henry 6, 58, is cited. And so if the bailee deliver them to the bailor in such a case, he is said not to be chargeable to the true owner (Ib. 607), for which 7 Henry 6, 22, is cited. The reasons given for such a doctrine, however satisfactory they may have been when they were announced, can hardly command assent now. It is now everywhere held, that when the true owner has by legal proceedings compelled a delivery to himself of the goods bailed, such delivery is a complete justification for non-delivery according to the directions of the bailor. *Bliven v. The Hudson River Railroad Co.* 36 N. Y. 408. And so when the bailee has actually delivered the property to the true owner, having a right to the possession, on his demand, it is a sufficient defence against the claim of the bailor. The decisions are numerous to this effect. *King v. Richards*, 6 Wharton, 418; *Bates v. Stanton*, 1 Duer, 79; *Hardman v. Wilcock*, 9 Bingham, 882; *Biddle v. Bond*, 6 Best & S. 225. If it be said that by accepting the bailment the bailee has estopped himself against questioning the right of his bailor, it may be remarked in answer, this is assuming what cannot be conceded. Undoubtedly the contract raises a strong presumption that the bailor is entitled, but it is not true that thereby the bailee conclusively admits the right of the principal. His contract is to do with the property committed to him what his principal has directed, to restore it *or to account for it*; *Cheeseman v. Exall*, 6 Exch. 341; and he does account for it when he has yielded it to the claim of one who has right paramount to that of his bailor. If there be any estoppel, it ceases when the bailment on which it is founded is determined by what is equivalent to an eviction by title paramount; that is, by the reclamation of possession by the true owner. *Biddle v. Bond*, *supra*. Nor can it be maintained, as has been argued in the present case, that a carrier can excuse himself for failure to deliver to the order of the shipper *only* when the goods have been taken from his possession by legal proceedings, or where the shipper has obtained the goods by fraud from the true owner. It is true that in some of the cases fraud of the shipper has appeared, and it has sometimes been thought it is only in such a case, or in a case where legal proceedings have interfered, that the bailee can set up the *jus tertii*. There is no substantial reason for the opinion. No matter whether the shipper has obtained the possession he gives to the carrier by fraud practised upon the true owner, or whether he mistakenly supposes he has rights to the property, his relation to his bailee is the same. He cannot confer rights which he does not himself possess, and if he cannot withhold the possession from the true owner, one claiming under him cannot. The modern and best considered cases treat as a matter of no importance the question how the bailor acquired the possession he has delivered to his bailee, and adjudge that if the bailee has delivered the property to one who had the right to it as the true owner, he may defend himself against any claim of his principal. In the late case of *Biddle v. Bond*, *supra*, decided in 1865, it was so decided; and Blackburn, J., in delivering the opinion of the court, said there was nothing to alter the law on the subject in the circumstance that there was no evidence to show the plaintiff, though a wrong-doer, did not honestly believe that he had the right. Said he, the position of the bailee is precisely the same, whether his bailor

was honestly mistaken as to the rights of the third person whose title is set up, or fraudulently acting in derogation of them. In *Western Transportation Co. v. Barber*, 56 N. Y. 544, the court of appeals of New York unanimously asserted the same doctrine, saying: "The best decided cases hold that the right of a third person to which the bailee has yielded may be interposed in all cases as a defence to an action brought by a bailor subsequently for the property. When the owner comes and demands his property he is entitled to its immediate delivery, and it is the duty of the possessor to make it. The law will not adjudge the performance of this duty tortious as against a bailor having no title." The court repudiated any distinction between a case where the bailor was honestly mistaken in believing he had the right, and one where a bailor obtained the possession feloniously or by force or fraud, and we think no such distinction can be made.

We do not deny the rule that a bailee cannot avail himself of the title of a third person (though that person be the true owner) for the purpose of keeping the property for himself, nor in any case where he has not yielded to the paramount title. If he could, he might keep for himself goods deposited with him without any pretence of ownership. But if he has performed his legal duty by delivering the property to its true proprietor at his demand, he is not answerable to the bailor. And there is no difference in this particular between a common carrier and other bailees.

Recurring then to the inquiry whether Porter & Co., to whose order the steamer delivered the one hundred and sixty-five bales of cotton, were the true owners of the cotton, a brief statement of the evidence on which their title rests is necessary. It originated as follows: On the 1st of April, 1869, one J. C. Forbes obtained from the master of the brig Colson, then lying at New Orleans, a bill of lading for one hundred and thirty-nine bales of cotton, described by specified marks. The bill was indorsed, and forwarded by Forbes to Porter & Co., and drafts against it to a large amount were drawn upon them, which they accepted, credited, and paid on or before the 7th of the month. In fact, however, when the bill of lading was given no such cotton had been received by the brig. But on the 5th of April the agent of Forbes bought one hundred and forty bales, then at the shipper's press, and directed them to be sent to the Colson, marked substantially as described in the bill of lading. These bales were accordingly delivered from the press to the brig on the 8th of April, and the first and second mates receipted for them. They were not actually taken on board, but they were deposited on the pier at the usual and ordinary place for the receipt of freight by the Colson, and an additional bill of lading for one bale only was taken by Forbes, and by him indorsed and transmitted to Porter & Co., together with an invoice of the one hundred and forty bales corresponding with the bills of lading. The marks and numbers on the bales were the same as those mentioned in the bills of lading, excepting only that thirty-five were marked L instead of thirty-six, and sixteen marked S instead of fifteen. There was also a small difference in the aggregate weight.

That the cotton thus delivered to the Colson was intended to fill the bills of lading, one of which had been previously given, is incontrover-

tible. They were so intended by the shipper. If not why were they thus marked? And why was a bill of lading taken for one bale only instead of for one hundred and forty; and why was the invoice of the whole number sent? Such also was plainly the understanding of the ship. The receipts of the mates, and the fact that the master gave a bill of lading for one bale marked S, when there were sixteen bales thus marked, leave this beyond reasonable doubt. What then? Why, the one hundred and forty bales thus shipped became from the moment of shipment the property of Porter & Co., to whom the bills of lading were indorsed. It is not only the utterance of common honesty, but the declaration of judicial tribunals, that a delivery of goods to a ship corresponding in substance with a bill of lading given previously, if intended and received to meet the bill of lading, makes the bill operative from the time of such delivery. At that instant it becomes evidence of the ownership of the goods. Thus, in *Rowley v. Bigelow*, 12 Pick. 307, it is said a bill of lading operates by way of estoppel against the master and also against the shipper and indorser. "The bill acknowledges the goods to be on board before the bill of lading is signed. But if through inadvertence or otherwise the bill of lading is signed before the goods are on board, upon the faith and assurance that they are at hand, as if they are received on the wharf ready to be shipped, or in the shipper's own warehouse, . . . and afterwards they are placed on board, as and for the goods embraced in the bill of lading, as against the shipper and master, the bill will operate on those goods by way of relation and estoppel." Such is also the doctrine asserted in *Halliday v. Hamilton*, 11 Wall. 565, and it is in harmony with the general rules that regulate the transfer of personal property. We do not say that a title to personal property may not be created between the issue of a bill of lading therefor and its delivery to the ship, which will prevail over the master's bill, but in the absence of any such intervening right, a bill of lading does cover goods subsequently delivered and received to fill it, and will represent the ownership of the goods. The cotton delivered on the 8th of April on the pier for the Colson, and received by the mates of the brig, became, therefore, at the instant of its delivery, the property of Porter & Co., who were then the indorsers of the bills of lading. Its subsequent removal by Forbes to the Ladona, either with or without the consent of the brig's officers, could not divert that ownership.

There is nothing in the statutes of Louisiana which requires a different conclusion. Those statutes prohibit the issue of bills of lading before the receipt of the goods, but they do not forbid curing an illegal bill by supplying goods, the receipt of which have been previously acknowledged. The statutes are designed to prevent fraud. They are not to be construed in aid of fraud, as they would be if held to make a delivery of goods to fill a fraudulent bill of lading inoperative for the purpose.

The title of Porter & Co. to the one hundred and forty bales must, therefore, as we have said, be held to have been perfected when they were delivered to the Colson on the 8th of April. No right in any other person intervened between the issue of the bill of lading and the brig's receipt of the cotton to fill it. It was after the title of Porter & Co. had thus become complete that Forbes removed the one hundred and forty bales from the custody of the Colson and shipped it for New York on the

Ladona, together with twenty-five other bales, re-marking it, and drawing drafts against this second shipment upon Shaeffer & Co. After carefully examining the evidence we cannot doubt that the one hundred and forty bales thus withdrawn from the Colson were shipped on the Ladona, and that they came to the possession of Shaeffer & Co., in New York, by whom they were transferred, together with the other twenty-five bales, to Mann, under whom the plaintiffs claim. The one hundred and sixty-five bales, then, are the identical bales that were included in the shipment on the Idaho, and for which the bill of lading was given to Mann. Of these, one hundred and forty were the property of Porter & Co., fraudulently withdrawn from their possession. It is hardly necessary to say that the title of the true owner of personal property cannot be impaired by the unauthorized acts of one not the owner. Taking possession of the property, shipping it, obtaining bills of lading from the carriers, indorsing away the bills of lading, or even selling the property and obtaining a full price for it, can have no effect upon the right of the owner. Even a *bond fide* purchaser obtains no right by a purchase from one who is not the owner or not authorized to sell. It must, therefore, be concluded that Porter & Co. were the owners of at least one hundred and forty of the bales shipped by Mann on the Idaho, and covered by the bill of lading to enforce which this libel was filed.

All that remains to be determined is whether Porter & Co. had a right to the possession of the additional twenty-five bales shipped with the one hundred and forty from New Orleans on the Ladona, and shipped also on the Idaho for Liverpool, together with the thirty-five bales delivered there to Finlay & Co. When the one hundred and forty bales were removed from the custody of the Colson and taken to the Ladona, twenty-five other bales were mingled with them. On the pier opposite that vessel they were re-marked, and all shipped as one lot under one bill of lading. When they reached New York they came into the possession of Shaeffer, the indorsee of the bill of lading given by the Ladona, who knew when he received them that the Colson was short eight hundred or one thousand bales. The newspapers had contained articles about the fraud. He himself was a sufferer. He held some of the fraudulent bills of lading of the Colson, and he had heard that Porter was in the same condition. So he has testified. With this knowledge he set to work to guard against the possibility of tracing the cotton. He caused the Colson marks to be removed from the one hundred and forty bales, and the Ladona marks to be removed from both the one hundred and forty and the twenty-five bales. He then had the whole re-marked, making no distinction between the lot of one hundred and forty and that of twenty-five, thus practically making the bales undistinguishable. In addition to this, by an arrangement between himself and Mann, his clerk, in the form of a sale, the cotton was shipped "*en masse*" by the Idaho. It is impossible for us to close our eyes upon the nature and purpose of this transaction. It was a perfect confusion of the one hundred and forty bales that belonged to Porter with the other twenty-five, and it was not accidental. It was purposely made, with an intent to embarrass or hinder the owner, and prevent him from recovering his original property. There is no conceivable motive for Shaeffer's obliterating the marks, both of the Colson and La-

done shipment, in so much haste (ordering it done on Sunday), and substituting new marks, except to destroy the evidence of title in any other person. That such was Schaeffer's purpose may also be inferred from his conduct in selling the same to Mann; from Mann's sale on the same day to the libellants, telling them he did not wish them to ask whether the cotton was really Schaeffer's; stating, also, that he had bought from Schaeffer, and that Schaeffer guaranteed the transaction; from Mann's turning over the libellants' note immediately to Schaeffer, and Schaeffer's giving a guarantee before its payment that the maker should be held harmless. The whole arrangement was manifestly a scheme of Schaeffer to obscure the title to the cotton, to prevent its being traced by the true owner, a scheme in the execution of which he was aided by Mann and the libellants.

Now, what must be the legal effect of all this? What the effect of intermingling the twenty-five bales with the one hundred and forty that belonged to Porter in such a manner that they could not be distinguished, and so completely that it is impossible for either party to identify any one of the one hundred and sixty-five bales as a part of the lot of twenty-five, or of the larger lot of one hundred and forty, shipped on the Colson? We can come to no other conclusion than this. The right of possession of the whole was in Porter, and neither he who caused the confusion, nor any one claiming under him, is entitled to any bale which he cannot identify as one of the lot of twenty-five. It is admitted the general rule that governs cases of intermixture of property has many exceptions. It applies in no case where the goods intermingled remain capable of identification, nor where they are of the same quality or value, as where guineas are mingled, or grain of the same quality. Nor does the rule apply where the intermixture is accidental, or even intentional, if it be not wrongful. But all the authorities agree that if a man wilfully and wrongfully mixes his own goods with those of another owner, so as to render them undistinguishable, he will not be entitled to his proportion, or any part of the property. Certainly not, unless the goods of both owners are of the same quality and value. Such intermixture is a fraud. And so, if the wrong-doer confounds his own goods with goods which he suspects may belong to another, and does this with intent to mislead or deceive that other, and embarrass him in obtaining his right, the effect must be the same. Thus it was ruled in *Ryder v. Hathaway*, 21 Pick. 306. Such is the present case. The confusion of the bales of cotton was not accidental. It was purposely made. The intermixture was evidently intended to render any identification of particular bales impracticable, and to cover them against the search of a suspected owner. It was, therefore, wrongful. And the bales were not of uniform value. They differed in weight and in grade. But even if they were of the same kind and value, the wronged party would have a right to the possession of the entire aggregate, leaving the wrong-doer to reclaim his own, if he can identify it, or to demand his proportional part. *Stephenson v. Little*, 10 Mich. 447. The libellants have made no attempt to identify any part.

See, upon this subject of confusion of goods, 2 Kent's Com. 11th ed. 364, 365; *Hart v. Ten Eyck*, 2 Johns. Ch. 62, 108; *Weil v. Silverston*, 6 Bush (Ky.), 698; *Hesseltine v. Stockwell*, 30 Maine, 370.

It follows from all we have said that the delivery by the Idaho of the one hundred and sixty-five bales, to the order of Porter & Co. was justifiable, and that the libellants have sustained no legal injury.

The decree of the circuit court is affirmed.

SUPREME COURT OF MICHIGAN.

[JANUARY, 1877.]

TAKING RAILROAD PROPERTY IN INVITUM. — "PUBLIC USE."

GRAND RAPIDS, NEWAYGO, AND LAKE SHORE R. R. CO. v. GRAND RAPIDS AND INDIANA R. R. CO.

The franchises and property of one railroad may be taken for the construction of another in all cases where the property of an individual might be, upon making compensation therefor; but not without.

Property taken for a particular public use does not thereby become public for all purposes; it may revert when the specific public easement is vacated.

The term "public use," as employed in proceedings for the taking of property *in invitum*, criticised as misleading, and limited accordingly.

THE complainant, the Grand Rapids, Newaygo, and Lake Shore Railroad Company, was organized in September, 1869, under the General Railroad Act, to build a road from Grand Rapids to Newaygo, and to some point beyond in Oceana or Mason County, and built its road in and near Grand Rapids in 1871 and 1872.

The defendant, the Grand Rapids and Indiana Railroad Company, was organized under the same law, but some years prior to the organization of the complainant, to build a road from Fort Wayne, Indiana, to some point on Little Traverse Bay, running through Grand Rapids; and its road was constructed and operated through Grand Rapids before the complainant's road was built.

As the roads make north from Grand Rapids, they run nearly parallel with each other and with Grand River, each on the west side of the river, and the defendant's road west of complainant's road.

On the west bank of the river, and between complainant's road and the river, are situated the extensive lumber manufactories of A. B. Long & Sons and Wonderly & Co., manufacturing about thirty million feet of lumber annually.

Before the complainant's track was laid, a switch or spur track connected defendant's road with a lumber track running between the mills aforesaid; and when complainant's road was constructed said spur track was cut off by complainant where it crossed complainant's right of way, and connected by a switch track with complainant's road, the connection of the defendant's road therewith being thus broken.

A very large part of the lumber manufactured at these mills was shipped over the defendant's road, and, as it had no connection of its own

with said mills, the complainant was in the habit of charging two dollars per car for each car-load which it delivered to the defendant over its switch track.

This being the situation in 1874, the defendant decided, under the law then in force, to build a spur track from its main line to connect with the lumber track of Wonderly & Co. and A. B. Long & Sons, and across the complainant's road.

The defendant filed its map and survey in the office of the register of deeds, showing the location of its proposed spur track, and was proceeding to build said track by preparing the necessary grade and putting the material upon the ground, when the complainant filed its bill to enjoin the defendant from crossing its track, alleging that the defendant had not given notice of its intention to cross, and the time when it would cross, complainant's track; that the complainant had not given its consent; that defendant had not obtained the right of way; that the map and survey did not locate the route; that it was not signed by a majority of its directors, and that it contemplated crossing at a point where the complainant had erected a depot.

The defendant, in its answer, denied that it ever had any intention of crossing or threatened to cross, except upon a full compliance with all the provisions of law authorizing one railroad to cross another.

The answer also denied that the complainant had a depot at the point where the defendant was about to cross, but says it was a small itinerant building eight feet by twelve, and eight feet high, used by complainant to obstruct the crossing of defendant, by placing it at any point where defendant proposed to cross, and was made in bad faith, and located at its present place for that purpose.

MARSTON, J. This case was heard upon pleadings and proofs, and a decree rendered perpetually enjoining defendant from entering upon complainant's property for the purpose of constructing a branch or spur track "without the consent of the complainant first had and obtained, or without first obtaining a condemnation thereof for the public use, and making compensation therefor agreeable to the provisions of law." From this decree, defendant, conceiving itself aggrieved, appealed.

The defendant only having appealed, and having, in the argument submitted, claimed a right to take the land as being already appropriated to public uses, it becomes unnecessary to consider some of the very interesting questions submitted by counsel for complainant in their brief, — as to whether this proposed spur track would be merely for the private use and benefit of defendant, and not of the public; and if for private use only, whether the lands of complainant could be condemned under the circumstances existing in the case. We shall therefore confine ourselves, in what we may here say, to the position submitted by counsel for appellant in their brief.

The appellant insists that, under sect. 36 of the laws of 1873 (1 Mich. Sess. Laws 1873, p. 526), it has a right to build this spur track, and that after the crossing shall have been made, if the companies cannot agree as to the compensation to be made by the company crossing, the same shall be ascertained by like proceedings and in like manner as is provided for taking of land or other property. It is also insisted that this statute is

valid and not in conflict with any constitutional provision; that the Constitution of Michigan (art. xv. § 1) provides that "corporations may be formed under general laws," and that "all laws passed pursuant to this section may be amended, altered, or repealed;" that the general railroad law, under which these companies were organized, was passed under and by virtue of the power conferred by this section of the Constitution, and that the act subjected the companies to certain *liabilities* and *restrictions*, — among others, the right to construct their road across any stream, private road, highway, railroad, or canal, and to cross or intersect any other railroad then or thereafter to be constructed; that while the same statute gave to railroad companies formed under it the power to purchase, receive, hold, and use lands and real estate for the purpose of constructing and maintaining its road, it granted the power for a *public use*, and not a private one, and subject to the reserved legislative power granted in the Constitution, which enabled the legislature to alter, amend, or repeal its charter at pleasure, and that it would be absurd to say, after a railroad has taken property for a *public use*, it immediately becomes *private property*, and is beyond the reserved power of the legislature, and that when another railroad company attempts to cross it, the latter company is appropriating private property for public use.

Such, in brief, is the argument of counsel for the appellant upon this branch of the case.

In so far as we can discover, this is the first time that such a position has been taken on behalf of a corporation. Heretofore, when this question has arisen, it has been insisted that the legislature could not authorize the property or franchises of a corporation to be taken under the exercise of the right of eminent domain. It was then argued by the corporations, that their property and rights were of so sacred and intangible a character that they could not be disturbed, although similar rights in the person of the citizen could be. The courts, however, uniformly held that in this respect there was no difference between corporate and individual rights; that a grant for one public purpose must yield to another equally important; but that in all such cases compensation should be made to those whose property or franchises were thus required and taken for the public use.

We consider the argument advanced in this case a very dangerous one for railroad companies to endeavor to enforce. If carried out to its legitimate and logical conclusion, it would, in effect, enable the legislature to take, or authorize to be taken from them, all property they might have acquired by condemnation, and authorize its use for other so called public purposes, without making any compensation whatever therefor. The company might thus be practically destroyed, and its rights given to another, or parcelled out. Some other very absurd results would follow, but we need not here refer to them.

Now without attempting at present to define the power of the legislature, under the clause of the Constitution referred to, it has never yet been claimed that the legislature under this reserved right could take the property which the corporation had acquired by purchase or otherwise, and give it to third parties, or authorize its being appropriated by or for the use of the public, without compensation being made therefor. A re-

peal of the law under which the corporation was organized would not vest the title to its property in the public. In so far as the corporation is a common carrier, the legislature has undoubted power to control and regulate it; but in so far as its property is concerned, — property taken by it for use in the building and operating its road, — so long at least as such property is used by the corporation for such purposes, it is as sacredly guarded and protected under our Constitution, and is as much beyond the reach or power of the legislature, as is the property of an individual. Whatever the right or title of the corporation may be in such lands, — whether a mere easement or something greater, — whether it may by some be considered public property and by others private, — call it by what name we will, practically, in order for the company to fully enjoy its rights therein, the case must not only be permanent in its nature, at least so long as the road is operated, but it must be exclusive. From the very nature of the construction and operation of railroads, the public cannot use their road in the usual or ordinary manner of using a common public highway. Neither the state nor any of its departments or municipalities have or claim any interest in the property or franchises of the company, — they neither pay nor contribute towards the purchase of the right of way or to keeping it in proper repair afterwards; all this is done by the company itself, and through its efforts, and the right thus acquired and paid for by the company is as much its property, and of value to it, as would be a like right or interest if owned by an individual. In justice, therefore, the corporation should have as clear a right to compensation for an injury, sustained in consequence of an appropriation or use of its property by another without its consent, as an individual would.

The theory that land taken under the power of eminent domain is taken for the *public use*, has really caused much mischief. The term "public use," or "public purpose," is misleading. An object may be public for one purpose, while for others it would not be. Corporations have frequently, in order to accomplish their purposes, sought to give this term its broadest meaning, and then, using it as a foundation to erect structures thereon wholly at variance with all well-known legal principles. In this they have derived encouragement and support from the courts, in holding that property thus taken and held by a private corporation is taken for a public purpose in order to find some ground upon which to authorize its being taken *in invitum*.

Now while railroads in one sense are for the use and accommodation of the public, and to this extent may be considered as used for public purposes, the mistake in this case consists in assuming that the property by them acquired, having been taken for a public purpose, may be used and appropriated by any other corporation for a similar public purpose, without making compensation therefor, — that property public for one purpose shall be public for all. But is this true? In the case of a common public highway every one has an equal right of passage over it; but if it is sought to appropriate it to some essentially different public use, as a railroad, it is now generally conceded that the owner of the soil would be entitled to additional compensation. A turnpike is also a public highway which the public have a right to use upon paying toll; if it is appropriated to some other public use, the turnpike company would be entitled to com-

pensation, and if the new use was essentially different from the old, the owner of the reversion would also be entitled to compensation. In the one case the public have the right to the free use of the road, in the other to the use upon paying toll, but in neither event are their rights considered in case of the road being appropriated to a different purpose.

If lands are taken for a site for a light-house or a fort, although clearly taken for public purposes, yet the public as such are excluded therefrom. The use for which it is designed is one that is inconsistent with individual rights either separate or collectively. In some cases where property is required for public use a mere temporary use or easement is required, while in others an apparently perpetual and exclusive occupation is required. In the former class whenever the public easement is relinquished or vacated, the owner of the reversion is restored to his original rights; while in the latter class it would not follow that he would have any rights whatever upon a relinquishment of the uses for which the property was acquired. It is apparent therefore that it will not do to say that property taken for a particular public use thereby becomes public for all purposes. The public may have the right to use it for certain purposes, and yet individuals or private corporations have rights therein at the same time. These rights may be considered as private rights, separate and distinct from the rights of the public. Wherever such private rights exist, they are entitled to protection and can only be divested in the same manner and under the same laws that individual rights may be.

Our conclusion upon this branch of the case is: that the franchises or property of one railroad may be taken for the construction of another, in all cases where the property of an individual might be upon making compensation therefor.

We refer to the following authorities, and while perhaps none of the cases cited cover the entire ground here gone over, yet we think they fully support the view taken: *Cooley Const. Lim.* 528 *et seq.*; 1 *Redfield on Railways*, 229 *et seq.*; *West River Bridge Co v. Dix*, 6 How. 529; *Richmond, &c. Ry. v. Louisiana, &c. Ry.* 13 How. 81; *Newcastle, &c. Ry. v. P. & I. Ry.* 3 Ind. 464; *Springfield v. Conn. R. R.* 4 Cush. 63; *Northern Ry. v. Concord, &c. R. R.* 7 Fost. 183. *Peoria, &c. R. R. v. Peoria & Springfield R. R.* 66 Ill. 174; *Enfield Toll Bridge Co. v. Hartford, &c. R. R.* 17 Conn. 40; *Matter of Kerr*, 42 Barb. 119; *Boston Water Power Co. v. Boston, &c. R. R.* 23 Pick. 360; *Central Bridge Co. v. Lowell*, 4 Gray, 482; *People v. Salem*, 20 Mich. 452; *Bench & Bar*, July 1871, p. 97.

It follows that the decree must be

Affirmed with costs.

SUPREME COURT OF THE UNITED STATES. — EASTERN DISTRICT OF PENNSYLVANIA.

[FEBRUARY, 1877.]

PATENT. — CONSTRUCTION OF CLAIM. — INFRINGEMENT.

LORILLARD & CO. v. McDOWELL.

The formal expression "as shown and described" is not to be taken to limit a claim to the exact construction shown and described. Hence where the claim of the patent was for "a plug of tobacco having a hard label pressed into one of its faces as specified," the description setting forth that the label was to be applied *underneath* the wrapper, and it appeared that defendant applied his label *outside* of the wrapper, it was held that the claim was infringed and a preliminary injunction was granted.

THE facts are sufficiently stated in the opinion.

George Harding, for complainant.

Leonard Myers, contra.

MCKENNON, J. This is a motion for an interlocutory injunction, to restrain infringement of the patent set up in the complainant's bill.

An original patent was granted Charles Seidler, on the 12th of January, 1875, which was surrendered and reissued to him October 24, 1876. The invention is thus described: "I have discovered and successfully developed in practice, a means of marking and distinguishing tobacco in plugs. I prepare labels or distinguishing pieces of separate material, and impress them into the body of the plugs, one label into each plug, preferably putting the label under the outside wrapper, and giving it a character by raised letters or analogous device, which is recognizable through the flexible covering. The material of which these labels are composed is preferably sheet iron tinned, cut into a circular form, and having points or prongs bent backward from their edges, and with raised or sunken letters or marks upon their upper face to indicate the quality, origin, or trade-mark. Before the plug of tobacco is subjected to its final pressure, one of these labels is placed upon it in proper position, and, by powerful pressure, the prongs of the label are sunk into the tobacco so that its face is about flush with the outer surface of the plug, and adheres firmly to it. An outer leaf of properly dampened tobacco is then wrapped around the plug, which is subjected to a powerful pressure, and the label is seen beneath this wrapper, and is rendered thereby difficult of removal. The invention is therefore claimed under five heads, the first and third of which are: —

"1. A plug of tobacco having a hard label pressed into one of its faces as specified.

"3. A plug of tobacco having letters or other decorative or distinguishing marks produced on a hard metallic surface, and pressed as specified."

These claims the respondents are alleged to have infringed, and construing them, as I think they must be construed, to indicate the impressment of a hard or metallic label upon either the inner or outer face of a plug of tobacco, the fact of infringement is clearly made out, both by the

affidavits read in support of the motion and by an inspection of the tobacco manufactured and sold by the respondents.

This construction of the patent has been very earnestly contested upon the ground that the specification describes only the mode of applying the label to the plug underneath the outer covering, and that the words "as specified" limit the scope of the claims to that particular mode; but the patentee must be understood as merely describing what he regards as the best mode of practising his invention, as the law requires him to do, and not as excluding a method different from it only in a single detail, which produces the same result and is distinctly within its object. He claims to have discovered a new method of identifying tobacco, which consists in the attachment of a hard label to each plug by pressing into it the points or prongs which project from the under surface of the label, and thus the fundamental object of his invention is fully effectuated. When this is done the outside wrapper is applied; but the label is thus placed underneath the wrapper, not as auxiliary in any way to the specific office of the label, but avowedly only to render it more difficult of removal. It is obvious then that to dispense with the additional safeguard, and to apply the label outside of the wrapper, does not differentiate the devices, nor does it vary the method of attaching them to the plug in any essential degree.

Of the objections to the validity of the patent, but little need be said at this stage of the case. The first of these is to the novelty of the invention, or rather that it is a double use of an old device. But it is not shown to have been used for any purpose analogous to that contemplated by the patentee, or even remotely suggestive of such use. It was the result of considerable thought and of careful and repeated experiments, and supplied a perfect means of distinguishing the quality and origin of plug tobacco, which had not before been furnished to either the manufacturer or consumer.

Nor does the denial of its patentability seem to me to have any firmer foothold. Simple as it is, it nevertheless involved reflection and experiment to bring it to practical maturity; and its evident utility, indicated by its prompt displacement of other identifying devices, and its very extensive use even by the respondents, strongly attests its patentable merit.

The remaining objection, that the reissue is void as not being for the same invention described in the original patent, is clearly untenable. The drawings in both are the same, and the specifications of both are substantially the same. They both describe, as the invention, a hard or metallic label, applied to a plug of tobacco before it is subjected to its final pressure, with characters impressed upon it, indicating its quality, origin, or trade-mark, while in the original patent the claim is limited to tobaccos to which the label is applied underneath the wrapper. To remedy this restriction, inadvertently imposed, as the commissioner of patents has conclusively found, the reissue was properly granted, with an expanded claim to secure to the patentee the full benefit of the invention described, but not claimed in the original.

The motion for a preliminary injunction must therefore be allowed.

SUPREME COURT OF THE UNITED STATES.

[FEBRUARY, 1877.]

CONSTITUTIONAL LAW. — OF THE POWER OF THE STATES TO FIX BY LAW THE CHARGES FOR STORAGE OF GRAIN IN WAREHOUSES.

MUNN v. THE PEOPLE.

It is within the power of a state to fix by law the maximum of charges for the storage of grain in warehouses in the state, although the grain is stored in bulk in such manner that the identity of different lots is not preserved.

A statute fixing such maximum is not repugnant to any of the provisions of the Constitution of the United States. 1. It does not "regulate commerce," within the meaning of section 8, article I. 2. It does not give a "preference . . . to the ports of one state," within the meaning of section 9, article I. 3. It is not contrary to that part of the XIVth Amendment which provides that no state shall "deprive any person of life, liberty, or property, without due process of law."

IN error to the supreme court of the State of Illinois.

Mr. Chief Justice WAITE delivered the opinion of the court.

The question to be determined in this case is whether the general assembly of Illinois can, under the limitations upon the legislative power of the states imposed by the Constitution of the United States, fix by law the maximum of charges for the storage of grain in warehouses at Chicago and other places in the state having not less than one hundred thousand inhabitants, "in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved."

It is claimed that such a law is repugnant —

1. To that part of sec. 8, art. I. of the Constitution of the United States which confers upon Congress the power "to regulate commerce with foreign nations and among the several states ;"

2. To that part of sec. 9 of the same article, which provides that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another ;" and

3. To that part of Amendment XIV. which ordains that no state shall "deprive any person of life, liberty, or property, without due process of law ; nor deny to any person within its jurisdiction the equal protection of the laws."

We will consider the last of these objections first.

Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional unless it is clearly so. If there is doubt the expressed will of the legislature should be sustained.

The Constitution contains no definition of the word "deprive," as used in the fourteenth amendment. To determine its signification, therefore, it is necessary to ascertain the effect which usage has given it when employed in the same or a like connection.

While this provision of the amendment is new in the Constitution of the United States, as a limitation upon the powers of the states, it is old

as a principle of civilized government. It is found in Magna Charta, and, in substance if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several states of the Union. By the fifth amendment it was introduced into the Constitution of the United States as a limitation upon the powers of the national government, and by the fourteenth as a guaranty against any encroachment upon an acknowledged right of citizenship by the legislatures of the states.

When the people of the United Colonies separated from Great Britain, they changed the form but not the substance of their government. They retained for the purposes of government all the powers of the British parliament, and, through their state constitutions or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective states, unless in express terms or by implication reserved to themselves. Subsequently, when it was found necessary to establish a national government for national purposes, a part of the powers of the states and of the people of the states was granted to the United States and the people of the United States. This grant operated as a further limitation upon the powers of the states, so that now the governments of the states possess all the powers of the parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibitions of the constitutions.

When one becomes a member of society he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. "A body politic," as aptly defined in the preamble of the Constitution of Massachusetts, "is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." This does not confer power upon the whole people to control rights which are purely and exclusively private; *Thorpe v. R. & B. R. Co.* 27 Vt. 143; but it does authorize the establishment of laws requiring each citizen to so conduct himself and so use his own property as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim, *Sic utere tuo ut alienum non lædas*. From this source come the police powers, which, as was said by Chief Justice Taney in the *License Cases*, 5 How. 583, "are nothing more or less than the powers of government inherent in every sovereignty, . . . that is to say, . . . the power to govern men and things." Under these powers the government regulates the conduct of its citizens one toward another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day statutes are to be found in many of the states upon some or all these subjects, and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference

with private property. With the fifth amendment in force, Congress, in 1820, conferred power upon the city of Washington "to regulate . . . the rates of wharfage at private wharves, . . . the sweeping of chimneys, and to fix the rates of fees therefor, . . . and the weight and quality of bread;" 3 Stat. 587, sec. 7; and, in 1848, "to make all necessary regulations respecting hackney carriages and the rates of fare of the same, and the rates of hauling by cartmen, wagoners, carmen, and draymen, and the rates of commission of auctioneers." 9 Stat. 224, sec. 2.

From this it is apparent that down to the time of the adoption of the fourteenth amendment it was not supposed that statutes regulating the use or even the price of the use of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular; it simply prevents the states from doing that which will operate as such a deprivation.

This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is "affected with a public interest it ceases to be *juris privati* only." This was said by Lord Chief Justice Hale more than two hundred years ago, in his Treatise De Portibus Maris (1 Harg. Law Tracts, 78), and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use he must submit to the control.

Thus, as to ferries, Lord Hale says, in his Treatise De Jure Maris (1 Harg. Law Tracts, 6), the king has "a right of franchise or privilege, that no man may set up a common ferry for all passengers, without a prescription time out of mind, or a charter from the king. He may make a ferry for his own use or the use of his family, but not for the common use of all the king's subjects passing that way; because it doth in consequent tend to a common charge, and is become a thing of public interest and use, and every man for his passage pays a toll, which is a common charge, and every ferry ought to be under a public regulation, viz., that it give attendance at due times, keep a boat in due order, and take but reasonable toll; for if he fail in these he is fineable." So if one owns the soil and landing places on both banks of a stream he cannot use them for the purposes of a public ferry, except upon such terms and conditions as the body politic may from time to time impose, and this because the common good requires that all public ways shall be under the control of the public authorities. This privilege or prerogative of the king, who in this connection only represents and gives another name to the body politic, is not primarily for his profit, but for the protection of the people and the promotion of the general welfare.

And again, as to wharves and wharfingers, Lord Hale, in his Treatise *De Portibus Maris*, already cited, says: "A man, for his own private advantage, may, in a port or town, set up a wharf or crane, and may take what rates he and his customers can agree for cranage, wharfage, houselage, pesage; for he doth no more than is lawful for any man to do, viz., makes the most of his own. . . . If the king or subject have a publick wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharfs only licensed by the queen, . . . or because there is no other wharf in that port, as it may fall out where a port is newly erected; in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, &c., neither can they be enhanced to an immoderate rate, but the duties must be reasonable and moderate, though settled by the king's license or charter. For now the wharf and crane and other conveniences are affected with a publick interest, and they cease to be *juris privati* only; as if a man set out a street in new building on his own land, it is now no longer bare private interest, but is affected by a publick interest." This statement of the law by Lord Hale was cited with approbation and acted upon by Lord Kenyon, at the beginning of the present century, in *Bolt v. Stennett*, 8 T. R. 606.

And the same has been held as to warehouses and warehousemen. In *Aldnutt v. Inglis*, 12 East, 527, decided in 1810, it appeared that the London Dock Company had built warehouses in which wines were taken in store at such rates of charge as the company and the owners might agree upon. Afterwards the company obtained authority under the general warehousing act to receive wines from importers before the duties upon the importation were paid, and the question was whether they could charge arbitrary rates for such storage or must be content with a reasonable compensation. Upon this point Lord Ellenborough said (p. 537): "There is no doubt that the general principle is favored both in law and justice, that every man may fix what price he pleases upon his own property, or the use of it; but if, for a particular purpose, the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms. The question then is, whether, circumstanced as this company is by the combination of the warehousing act with the act by which they were originally constituted, and with the actually existing state of things in the port of London, whereby they alone have the warehousing of these wines, they be not, according to the doctrine of Lord Hale, obliged to limit themselves to a reasonable compensation for such warehousing. And according to him, whenever the accident of time casts upon a party the benefit of having a legal monopoly of landing goods in a public port, as where he is the owner of the only wharf authorized to receive goods which happens to be built in a port newly erected, he is confined to take reasonable compensation only for the use of the wharf." And further on (p. 539): "It is enough that there exists in the place and for the commodity in question a virtual monopoly of the warehousing for this purpose, on which the principle of law attaches as laid down by Lord Hale in the passage referred to [that from *De Portibus Maris*, already

quoted], which includes the good sense as well as the law of the subject." And in the same case, Le Blanc, J., said (p. 541): "Then, admitting these warehouses to be private property, and that the company might discontinue this application of them, or that they might have made what terms they pleased in the first instance, yet having as they now have this monopoly, the question is, whether the warehouses be not private property clothed with a public right, and if so, the principle of law attaches upon them. The privilege, then, of bonding these wines being at present confined by the act of parliament to the company's warehouses, is it not the privilege of the public, and shall not that which is for the good of the public attach on the monopoly, that they shall not be bound to pay an arbitrary but a reasonable rent? But upon this record the company resist having their demand for warehouse rent confined within any limit, and though it does not follow that the rent in fact fixed by them is unreasonable, they do not choose to insist on its being reasonable for the purpose of raising the question. For this purpose, therefore, the question may be taken to be, whether they may claim an unreasonable rent. But though this be private property, yet the principle laid down by Lord Hale attaches upon it, that when private property is affected with a public interest it ceases to be *juris privati* only; and in case of its dedication to such a purpose as this, the owners cannot take arbitrary and excessive duties, but the duties must be reasonable."

We have quoted thus largely the words of these eminent expounders of the common law, because, as we think, we find in them the principle which supports the legislation we are now examining. Of Lord Hale it was once said by a learned American judge: "In England, even on rights of prerogative, they scan his words with as much care as if they had been found in Magna Charta, and the meaning once ascertained, they do not trouble themselves to search any further." 6 Cowen, 536, note.

In later times the same principle came under consideration in the supreme court of Alabama. That court was called upon, in 1841, to decide whether the power granted to the city of Mobile to regulate the weight and price of bread was unconstitutional, and it was contended that "it would interfere with the right of the citizen to pursue his lawful trade or calling in the mode his judgment might dictate;" but the court said, "there is no motive, . . . for this interference on the part of the legislature with the lawful actions of individuals or the mode in which private property shall be enjoyed, unless such calling affects the public interest, or private property is employed in a manner which directly affects the body of the people. Upon this principle, in this state, tavern-keepers are licensed; . . . and the county court is required at least once a year to settle the rates of innkeepers. Upon the same principle is founded the control which the legislature has always exercised in the establishment and regulation of mills, ferries, bridges, turnpike roads, and other kindred subjects." *Mobile v. Yuille*, 8 Ala. N. S. 140.

From the same source comes the power to regulate the charges of common carriers, which was done in England as long ago as the third year of the reign of William and Mary, and continued until within a comparatively recent period. And in the first statute we find the following suggestive

preamble, to wit: "And whereas divers wagoners and other carriers, by combination amongst themselves, have raised the prices of carriage of goods in many places to excessive rates, to the great injury of the trade: Be it, therefore, enacted," &c. 3 W. & M., chap. 12, sec. 24, 3 Statutes at Large (Great Britain), 481. Common carriers exercise a sort of public office and have duties to perform in which the public is interested. *New Jersey Nav. Co. v. Merchants' Bk.* 6 How. 382. Their business is, therefore, "affected with a public interest," within the meaning of the doctrine which Lord Hale has so forcibly stated.

But we need not go further. Enough has already been said to show that when private property is devoted to a public use it is subject to public regulation. It remains only to ascertain whether the warehouses of these plaintiffs in error and the business which is carried on there come within the operation of this principle.

For this purpose we accept as true the statements of fact contained in the elaborate brief of one of the counsel of the plaintiffs in error. From these it appears that "the great producing region of the West and North-west sends its grain by water and rail to Chicago, where the greater part of it is shipped by vessel for transportation to the seaboard, by the great lakes, and some of it is forwarded by railway to the eastern ports. . . . Vessels, to some extent, are loaded in the Chicago harbor and sailed through the St. Lawrence directly to Europe. . . . The quantity [of grain] received in Chicago has made it the greatest grain market in the world. This business has created a demand for means by which the immense quantity of grain can be handled or stored, and these have been found in grain warehouses, which are commonly called *elevators*, because the grain is *elevated* from the boat or car, by machinery operated by steam, into the bins prepared for its reception; and *elevated* from the bins, by a like process, into the vessel or car which is to carry it on. . . . In this way the largest traffic between the citizens of the country north and west of Chicago, and the citizens of the country lying on the Atlantic coast north of Washington, is in grain which passes through the elevators of Chicago. In this way the trade in grain is carried on by the inhabitants of seven or eight of the great states of the West, with four or five of the states lying on the sea-shore, and forms the largest part of inter-state commerce in these states. The grain warehouses or elevators in Chicago are immense structures, holding from 300,000 to 1,000,000 bushels at one time, according to size. They are divided into bins of large capacity and great strength. . . . They are located with the river harbor on one side and the railway tracks on the other, and the grain is run through them from car to vessel, or boat to car, as may be demanded in the course of business. It has been found impossible to preserve each owner's grain separate, and this has given rise to a system of inspection and grading, by which the grain of different owners is mixed, and receipts issued for the number of bushels which are negotiable, and redeemable in like kind, upon demand. This mode of conducting the business was inaugurated more than twenty years ago, and has grown to immense proportions. The railways have found it impracticable to own such elevators, and public policy forbids the transaction of such business by the carrier; the ownership has, therefore, been by private individuals, who have embarked

their capital and devoted their industry to such business as a private pursuit."

In this connection it must also be borne in mind that although in 1874 there were in Chicago fourteen warehouses adapted to this particular business and owned by about thirty persons, nine business firms controlled them, and that the prices charged and received for storage were such "as have been from year to year agreed upon and established by the different elevators or warehouses in the city of Chicago, and which rates have been annually published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication." Thus it is apparent that all the elevating facilities through which these vast productions "of seven or eight great states of the West" must pass on the way "to four or five of the states on the sea-shore," may be a "virtual" monopoly.

Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartman, or the hackney-coachman pursues a public employment and exercises "a sort of public office," these plaintiffs in error do not. They stand, to use again the language of their counsel, in the very "gateway of commerce," and take toll from all who pass. Their business most certainly "tends to a common charge, and is become a thing of public interest and use." Every bushel of grain for its passage "pays a toll, which is a common charge," and, therefore, according to Lord Hale, every such warehouseman "ought to be under public regulation, viz., that he . . . take but reasonable toll." Certainly if any business can be clothed "with a public interest and cease to be *juris privati* only," this has been. It may not be made so by the operation of the Constitution of Illinois or this statute, but it is by the facts.

We also are not permitted to overlook the fact that, for some reason, the people of Illinois, when they revised their Constitution in 1870, saw fit to make it the duty of the general assembly to pass laws "for the protection of producers, shippers, and receivers of grain and produce" (Art. XIII., sec. 7), and by sec. 5 of the same article to require all railroad companies receiving and transporting grain in bulk or otherwise to deliver the same at any elevator to which it might be consigned, that could be reached by any track that was or could be used by such company, and that all railroad companies should permit connections to be made with their tracks, so that any public warehouse, &c. might be reached by the cars on their railroads. This indicates very clearly that during the twenty years in which this peculiar business had been assuming its present "immense proportions," something had occurred which led the whole body of the people to suppose that remedies such as are usually employed to prevent abuses by virtual monopolies might not be inappropriate here. For our purposes we must assume that if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the state. But if it could, we must presume it did. Of

the propriety of legislative interference within the scope of legislative power the legislature is the exclusive judge.

Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin; that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long known and well established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations if they use it in this particular manner.

It matters not in this case that these plaintiffs in error had built their warehouses and established their business before the regulations complained of were adopted. What they did was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good. They entered upon their business and provided themselves with the means to carry it on subject to this condition. If they did not wish to submit themselves to such interference, they should not have clothed the public with an interest in their concerns. The same principle applies to them that does to the proprietor of a hackney carriage, and as to him it has never been supposed that he was exempt from regulating statutes or ordinances because he had purchased his horses and carriage and established his business before the statute or the ordinance was adopted.

It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question.

As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will and compel the public to yield to his terms or forego the use.

But a mere common law regulation of trade or business may be changed by statute. A person has no property, no vested interest in any rule of the common law. That is only one of the forms of municipal law,

and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process, but the law itself as a rule of conduct may be changed at the will or even at the whim of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one.

We know that this is a power which may be abused, but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts.

After what has already been said it is unnecessary to refer at length to the effect of the other provision of the fourteenth amendment which is relied upon, viz., that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Certainly it cannot be claimed that this prevents the state from regulating the fares of hackmen or the charges of draymen in Chicago, unless it does the same thing in every other place within its jurisdiction. But, as has been seen, the power to regulate the business of warehouses depends upon the same principle as the power to regulate hackmen and draymen, and what cannot be done in the one case in this particular cannot be done in the other.

We come now to consider the effect upon this statute of the power of Congress to regulate commerce.

It was very properly said in the case of the *State Tax on Railway Gross Receipts*, 15 Wall. 293, that "it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution." The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the State of Illinois. They are used as instruments by those engaged in state as well as those engaged in inter-state commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with inter-state commerce, but not necessarily so. Their regulation is a thing of domestic concern, and certainly until Congress acts in reference to their inter-state relations the state may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction. We do not say that a case may not arise in which it will be found that a state, under the form of regulating its own affairs, has encroached upon the exclusive domain of Congress in respect to inter-state commerce; but we do say, that upon the facts as they are presented to us in this record, that has not been done.

The remaining objection, to wit, that the statute in its present form is repugnant to section 9, article I. of the Constitution of the United States, because it gives preference to the ports of one state over those of another, may be disposed of by the single remark that this provision operates only as a limitation of the powers of Congress, and in no respect affects the states in the regulation of their domestic affairs.

We conclude, therefore, that the statute in question is not repugnant to the Constitution of the United States, and that there is no error in the judgment. In passing upon this case we have not been unmindful of the vast importance of the questions involved. This and cases of a kindred character were argued before us more than a year ago by the most eminent counsel, and in a manner worthy of their well earned reputations. We have kept the cases long under advisement, in order that their decision might be the result of our mature deliberations.

The judgment is affirmed.

CHICAGO, BURLINGTON, AND QUINCY RAILROAD CO. v. CUTTS, Attorney General.

A state has power to control the rates of fare and freight charged by a common carrier within its jurisdiction. The doctrine of *Munn v. The People*, *supra*, applied.

APPEAL from the circuit court of the United States for the District of Iowa.

Mr. Chief Justice WAITE delivered the opinion of the court.

Railroad companies are carriers for hire. They are incorporated as such, and given extraordinary powers in order that they may the better serve the public in that capacity. They are, therefore, engaged in a public employment affecting the public interest, and, under the decision in *Munn & Scott v. The People*, just announced, subject to legislative control as to their rates of fare and freight, unless protected by their charters.

The Burlington and Missouri River Railroad Company, the benefit of whose charter the Chicago, Burlington, and Quincy Railroad Company now claims, was organized under the general corporation law of Iowa, with power to contract, in reference to its business, the same as private individuals, and to establish by-laws and make all rules and regulations deemed expedient in relation to its affairs, but being subject, nevertheless, at all times to such rules and regulations as the General Assembly of Iowa might from time to time enact and provide. This is in substance its charter, and to that extent it is protected as by a contract, — for it is now too late to contend that the charter of a corporation is not a contract within the meaning of that clause in the Constitution of the United States which prohibits a state from passing any law impairing the obligation of a contract. Whatever is granted is secured subject only to the limitations and reservations in the charter or in the laws or constitutions which govern it.

This company, in the transaction of its business, has the same rights, and is subject to the same control, as private individuals under the same circumstances. It must carry when called upon to do so, and can charge only a reasonable sum for the carriage. In the absence of any legislative regulation upon the subject, the courts must decide for it, as they do for private persons, when controversies arise, what is reasonable. But when the legislature steps in and prescribes a maximum of charge, it operates

upon this corporation the same as it does upon individuals engaged in a similar business. It was within the power of the company to call upon the legislature to fix permanently this limit and make it a part of the charter, and if it was refused, to abstain from building the road and establishing the contemplated business. If that had been done, the charter might have presented a contract against future legislative interference. But it was not, and the company invested its capital, relying upon the good faith of the people and the wisdom and impartiality of legislators for protection against wrong under the form of legislative regulation.

It is a matter of no importance that the power of regulation now under consideration was not exercised for more than twenty years after this company was organized. A power of government which actually exists is not lost by nonuser. A good government never puts forth its extraordinary powers except under circumstances which require it. That government is the best which, while performing all its duties, interferes the least with the lawful pursuits of its people.

In 1691, during the third year of the reign of William and Mary, parliament provided for the regulation of the rates of charges by common carriers. This statute remained in force, with some amendment, until 1827, when it was repealed, and it has never been reenacted. No one supposes that the power to restore its provisions has been lost. A change of circumstances seemed to render such a regulation no longer necessary, and it was abandoned for the time. The power was not surrendered. That remains for future exercise when required. So here, the power of regulation existed from the beginning, but it was not exercised until in the judgment of the body politic the condition of things was such as to render it necessary for the common good.

Neither does it affect the case that before the power was exercised the company had pledged its income as security for the payment of debts incurred, and had leased its road to a tenant that relied upon the earnings for the means of paying the agreed rent. The company could not grant or pledge more than it had to give. After the pledge and after the lease the property remained within the jurisdiction of the state, and continued subject to the same governmental powers that existed before.

The objection that the statute complained of is void because it amounts to a regulation of commerce among the states has been sufficiently considered in the case of *Munn & Scott*. This road, like the warehouse in that case, is situated within the limits of a single state. Its business is carried on there, and its regulation is a matter of domestic concern. It is employed in state as well as in inter-state commerce, and until Congress acts, the state must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within its own jurisdiction, even though in so doing those without may be indirectly affected.

It remains only to consider whether the statute is in conflict with sec. 4, art. I. of the Constitution of Iowa, which provides that "all laws of a general nature shall have a uniform operation," and that "the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

The statute divides the railroads of the state into classes according to business, and establishes a maximum of rates for each of the classes. It operates uniformly on each class, and this is all the Constitution requires. The supreme court of the state, in the case of *McAunich v. M. & M. R. R. Co.* 20 Iowa, 848, in speaking of legislation as to classes, said: "These laws are general and uniform, not because they operate upon every person in the state, for they do not, but because every person who is brought within the relation and circumstances provided for is affected by the law. They are general and uniform in their operation upon all persons in the like situation, and the fact of their being general and uniform is not affected by the number of persons within the scope of their operation." This act does not grant to any railroad company privileges or immunities which upon the same terms do not equally belong to every other railroad company. Whenever a company comes into any class, it has all the "privileges and immunities" that have been granted by the statute to any other company in that class.

It is very clear that a uniform rate of charges for all railroad companies in the state might operate unjustly upon some. It was proper, therefore, to provide in some way for an adaptation of the rates to the circumstances of the different roads, and the general assembly, in the exercise of its legislative discretion, has seen fit to do this by a system of classification. Whether this was the best that could have been done is not for us to decide. Our province is only to determine whether it could be done at all and under any circumstances. If it could, the legislature must decide for itself, subject to no control from us, whether the common good requires that it should be done.

We find no error in the decree below, and it is, therefore, affirmed.

SUPREME COURT OF NEW YORK.—CITY AND COUNTY OF
NEW YORK.

[JULY, 1876.]

OF THE RIGHT OF A MANUFACTURING CORPORATION TO THE EXCLUSIVE USE OF ITS NAME UPON ITS GOODS.—TRADE-MARK.

AMOSKEAG MANUFACTURING CO. v. GARNER.

Plaintiff, a manufacturing company, had long applied its corporate name, "The Amoskeag Manufacturing Company," to numerous kinds of cotton goods, which were widely known as "Amoskeag" goods, but had never made "prints." Defendant used the word "Amoskeag" on prints: *Held*, that plaintiff was entitled to an injunction restraining defendant from such use of its corporate name.

THE facts are stated in the opinion.

Messrs. *Evarts, Southmayd & Choate*, for the plaintiff.

T. R. Marsh, Esq., contra.

BARRETT, J. The main question in this case is, whether the defendants have a right to apply the distinctive part of the plaintiff's name to prints or calicoes.

The plaintiff is, and has been for many years, a manufacturer of cotton goods in general, and its productions have extended to almost every variety of such goods.

It has never, however, produced nor dealt in that particular class of cotton goods known as prints or calicoes, and consequently has never applied thereto its corporate name nor any part of it.

Its goods are, and have been, sold under the name of "The Amoskeag Manufacturing Company," which was given to it in 1831, by the Legislature of New Hampshire. Sometimes its full name has appeared upon the labels affixed to its goods, at other times the word "Amoskeag," and again "A. M. Co.," or "A. M. C."

It is not disputed that, so far as the word "Amoskeag" has been applied by plaintiff to cotton goods actually manufactured and sold by it, the use of such word is its exclusive right. The claim is that, as to any description of cotton goods which the plaintiff has not yet produced, the word "Amoskeag" is common property, and that therefore the defendants were at liberty to apply it as their trade-mark, even as against the plaintiff, to prints or calicoes.

This claim rests upon the assumption that the word "Amoskeag" is simply the plaintiff's trade-mark—that is, a geographical name in which the plaintiff can have no exclusive property except so far as it has been actually applied. It ignores the fact that the word stands for, and is in reality, the distinctive part of the plaintiff's corporate name. If the plaintiff had been incorporated, say, as "The Manchester Manufacturing Company," and had used the word "Amoskeag" merely to distinguish its goods, the question whether there could be any property in the name, except as to those classes of goods to which it had actually been applied, would have been presented for consideration.

It would then have been similar to the "I X L" case, where this question was decided in the negative by the examiner in the English patent office (Browne on Trade-marks, §§ 68-70), but whether correctly or not remains to be judicially determined. The courts have gone no further than to say that the property in such marks does not extend to *an entirely different* line of industry; as, if a person does not carry on a trade in iron, but carries on a trade in linen, and stamps a lion on his linen, another person may stamp a lion on iron. *Ainsworth v. Walsley*, Eng. Law Rep. 1 Eq. 518; *Hall v. Barrows*, 10 Jur. N. S. 55.

But when it is considered that the word "Amoskeag" stamped upon the plaintiff's goods is nothing more nor less than an abbreviation like "A. M. Co.," or "A. M. C.," of "the Amoskeag Manufacturing Company," a very different question, which is the only one really in the case, is up for judgment.

The plaintiff's corporate name was lawfully given to it by legislative action over forty years ago, and there would seem to be no good reason why it should not receive as much protection against the unauthorized use of its name as a natural person. In *Holmes v. Holmes*, 37 Conn. 278, and *Newby v. The Oregon Central R. R. Co.* 1 Dedy U. S. 609, it was held

that a corporate name was entitled to protection to the same extent as a trade-mark. In *Ainsworth v. Walmsley*, 44 L. J. R. 252, Vice-Chancellor Wood said that a man's name was "a still stronger trade-mark than any that can well be devised, subject only to the inconvenience which a name has and a trade-mark has not,"—an inconvenience the possibility of which is greatly lessened in the case of a corporation—"that two people may be of the same name."

In this connection it may be noted that the defendants lay no claim to the name "Amoskeag," either as representing the locality where the prints are manufactured, or as in itself indicating the manufacture, origin, or ownership of the goods.

Now, it will scarcely be pretended that the defendants have the right to call their prints "The Amoskeag Manufacturing Company Prints." And why not? Is it because the plaintiff has acquired a special and limited property *in its own name*, by its application to certain articles? Assuredly not. The right is denied not merely upon the narrow ground of the violation of an ordinary trade-mark, but upon the broad principle that the plaintiff is entitled, under such circumstances, to protection against the unauthorized use of its name. Such a use is conclusive evidence of the wrong which the law undertakes to redress, viz., "the sale of the goods of one person as being those of another." *Amoskeag Manufacturing Co. v. Spear*, 2 Sand. S. C. 599.

Now, if the defendants have not the right to use the plaintiff's name directly, they certainly have not the right to use it indirectly. For instance, in view of the evidence in this case, the defendants could no more rightfully call their prints "A. M. Co. prints" than they could style them "The Amoskeag Manufacturing Company prints," because that would still be a representation, less full, pointed, and direct, but none the less fraudulent, that the prints were of the plaintiff's production. "A. M. Co." is not merely a trade-mark, but a well known, long used, and thoroughly understood abbreviation of the plaintiff's name. So with the word "Amoskeag." It brings before the mind of the dealer in cotton goods, not a mere geographical designation, but "The Amoskeag Manufacturing Company." He sees the full name of the company the moment his eye rests upon the distinctive part of it. To stamp the word "Amoskeag," therefore, upon cotton goods is substantially to represent, and that whether such be the intention or not, which is immaterial in applying the remedy (*Millington v. Fox*, 3 Myl. & Cr. 338), that such goods are manufactured by the Amoskeag Manufacturing Company.

It was contended that the plaintiff's claim was practically of a monopoly in the word "Amoskeag." But not so. The word is free to those engaged in other and distinct lines of industry, because there its use conveys no such meaning as when applied to cotton goods. Whether such meaning is conveyed is a question of fact to be determined upon the evidence in each case.

The manufacturer of cement, for instance, might apply the word "Amoskeag" to that article, because when stamped upon cement, it would not stand for "The Amoskeag Manufacturing Company." *In that connection*, it would be a mere geographical designation (in which *per se* no one has an exclusive right until applied), and not in effect the plaintiff's name.

Its use, consequently, would deceive no one, because it would not convey the idea, and, therefore, would not represent that the cement was the plaintiff's production.

Applied, however, to any and every variety of cotton goods, whether such as the plaintiff has, or has not, as yet manufactured, it could not fail to indicate the plaintiff's name, and that the goods were of its manufacture.

If the word "Amoskeag" were not the distinctive part of the plaintiff's name, it *might be claimed*, as in the "I X L" case, that its use upon a new variety in the same general line of goods did not necessarily indicate either the name or the manufacture. But if in the "I X L" case the mark had been the name of the manufacturer, or even if the letters "I X L" had been his initials, the examiner would, doubtless, have arrived at a different conclusion. Otherwise, a person preparing to embark in a particular line of industry would have to see to it, if he desired to be protected in the use of his name, or of an abbreviation well known to stand for his name, that his *earliest* productions covered every possible variety of goods in such general line.

The only difference between the parties on this head is as to the legal treatment of the word "Amoskeag." The learned counsel for the defendant says: "It is no part of our claim that Mr. Jones can use Mr. Baker's name on Mr. Jones's goods." And he adds: "If a baker puts forth a 'Boston' cracker, and uses the name until it becomes a trade-mark, it does not prevent another baker from putting out a 'Boston Roll,' or a 'Boston Pie,' or a 'Boston Plum-Pudding.'"

But now suppose that the plaintiff had received from the Legislature of New Hampshire the name of "The Amoskeag Baking Company," and for forty years had been engaged in the humbler, though hardly less useful, avocation of "manufacturing" almost every variety of bread, roll, muffin, cracker, biscuit, cake, and pie, on which articles of food it had invariably stamped its corporate name, or some abbreviation thereof, such as "Amoskeag B. Co.," or "Am. Baking Co.," or "Am. B. Co.," or "*Amoskeag*"! Suppose, however, that the plaintiff had omitted, or had not yet decided, to make and vend the single variety known as "Crumpets," and thereupon a rival baker attempted to sell his crumpets as "Amoskeag Crumpets," would not any customer, upon seeing the name thus applied, naturally say that the Amoskeag Baking Company had added crumpets to its other varieties of bread? And would not the rival bakery be restrained — upon the plain principle of an unauthorized use of the company's name? The parallel is not precise, as the printing of calicoes may require some additional machinery. But the difference is only in degree.

Looking at it in another point of view, can there be any doubt that if the defendants were incorporated under the name of "The Garner Manufacturing Company," and if the positions in this case were reversed, the present plaintiff would be restrained from styling its prints "Garner prints;" and upon precisely the same principle?

For surely no just distinction can be drawn from the fact of the distinctive part of the corporate name having originated in the one case with an individual, and in the other with a locality.

These considerations are independent of the special facts of the case.

But the proof is abundant that the use of the word "Amoskeag" was an advantage to the defendants in the introduction and sale of their prints.

For although the first purchaser of prints may test the quality, yet an old and well established name in good repute would naturally call his attention to the goods, and would thus be worth to the seller more than a new and hitherto unknown name.

The defendants have never directly represented to purchasers that these Amoskeag prints were of the plaintiff's production, and there is nothing whatever in the case to justify the belief that they would have been capable of any such deceit. For aught that appears, they have acted upon the impression that as to cotton goods not manufactured by the plaintiff, they had a legal right to the use of the name of "Amoskeag." Be that as it may, there is no doubt that "Amoskeag" was taken and adopted because likely to facilitate the sale of the prints; and not only was the use of the name, as we have seen, under the circumstances, a representation, but as a matter of fact many persons were deceived thereby. It is true that these persons may not have scrutinized the labels with great care, and that, by proper inquiry, they might easily have ascertained who the printers were.

The criterion, however, is not the certainty of success in misleading the public, but, as was said by Duer, J., in the *Amoskeag Man. Co. v. Spear*, its probability or even possibility.

There is another fact, which of itself might well have afforded ground for relief, and which ought to be adverted to. The plaintiff has never applied the name of "Amoskeag" to inferior, nor indeed to any but its best goods. Anything less than the best has been sold under other names. Thus the plaintiff has built up a vast business in which its name applied to goods has become synonymous with standard worth.

Now, the manner in which the defendants have made use of the word "Amoskeag" has been prejudicial to this reputation.

At one time they applied it to prints that were not their best, then for some time to their best, and afterwards again reduced the grade. Thus the name of the Amoskeag Co. applied to prints, at times represented a certain inferiority, at other times fluctuation, and at all events not that steady and invariable highest excellence, which it has been the effort of the plaintiff's business existence to see connected with its name. The effect of this upon the public may in a degree be judged by the remark made to Governor Straw, by a Western dry goods merchant: "How is it that your Amoskeag goods are so very good, with the exception of the prints; and why is it you make such devilish bad prints?"

For these reasons the defendants should be enjoined from using the name of "Amoskeag" upon their prints or calicoes, unless such relief should be denied to the plaintiff by reason of its laches.

And this brings us to the second, and certainly not the least difficult, branch of the case. The English cases upon this head do not appear to be altogether harmonious.

In *Beard v. Turner*, 13 L. T. R. N. S. 747, Vice-Chancellor Wood held that a delay of two years was such laches as to disentitle the plaintiff to any relief whatever; while in *Harrison v. Taylor*, 11 Jur. N. S. 408, where the delay was but little less, he granted an injunction to restrain the use

of the plaintiff's trade-mark, but refused an account of the profits, because of the laches.

In the former case, the general principle was stated, that "if you induce another to lay out money by keeping back a right which you intend at some future time to assert, you may induce him to incur serious expenditure; . . . and . . . if you allow considerable expenditure to be made, you are not allowed afterward to question the title of the person who has made that expenditure." Upon this ground, had the facts warranted it, the injunction might well have been refused, but the vice-chancellor declared that the rule did not apply to the case before him, as the expenditure was insufficient. He then proceeded to consider another and entirely independent proposition, viz., that if you ask an account of the profits, you must come into court at once. Upon this he not only denied the profits, but dismissed the bill, stating that upon the whole evidence there was not that case of fraud made out which would justify any other result. It is difficult here to understand precisely what legal sequence was drawn from the delay, for although this question is fully discussed, yet the dismissal of the bill in all its parts—that is, as to the injunction as well as the profits—is finally put upon another ground, and that, too, a ground which, understanding *actual* fraud to be meant, is scarcely tenable. For an injunction was allowed in *Millington v. Fox*, *supra*, although a case of fraud, in fact, was not made out; also in *Harrison v. Taylor*, *supra*, although the *scienter* was not proved.

The case is certainly somewhat confusing, and hardly an authority for the extreme doctrine contended for with respect to laches. The better rule is that laid down in *Harrison v. Taylor*, and it is the rule which has prevailed in this country.

In the *Amoskeag Manufacturing Co. v. Spear*, *supra*, Duer, J., remarked: "The consent of a manufacturer to the use or imitation of his trade-mark by another may, perhaps, be justly inferred from his knowledge and silence; but such a consent, whether express or implied, when purely gratuitous, may certainly be withdrawn; and when implied, it lasts no longer than the silence from which it springs. It is, in reality, no more than a revocable license. The existence of the fact may be a proper subject of inquiry on taking an account of profits, if such an account shall hereafter be decreed; but even the admission of the fact would furnish no reason for refusing an injunction."

This was followed in *Gillott v. Esterbrook*, 47 Barb. 455. There the infringement had proceeded for some twenty years. This was generally known to the plaintiff, as appeared from his "caution," but it did not appear that he had discovered "any individual whom he could attack as an offender." Judge Potter remarked that the legal effect of the evidence was: (1.) "That it is no defence that the fraud has been multiplied; (2.) that acquiescence cannot be inferred, and it is revocable if it could be."

Taylor v. Carpenter, 2 Wood. & M. 1, was an action at law, and consequently the rule there laid down is not fully applicable. It is, however, instructive as showing the views entertained upon this question by a court of law. After holding that a neglect to prosecute because one believed he had no rights, or from mere procrastination, is no defence at law except

under the statute of limitations pleaded and relied on, or under some positive statute, Woodbury, J., declares that "there is something very abhorrent in allowing such a defence to a wrong which consists in counterfeiting others' marks or stamps, defrauding others of what had been gained by their industry and skill, and robbing them of the fruits of their good name, merely because they have shown forbearance and kindness."

In a case in equity between the same parties (3 Story, 458) Judge Story took substantially the same views, and his opinion was approved of in *Coats v. Holbrook*, 2 Sand. Ch. R. 586.

Judge Woodbury's language was quoted with approval in *Filley v. Fassett*, 44 Mo. 168 (an equity case), and the rule stated in *The Amoskeag Manuf. Co. v. Spear* was reaffirmed in our own state (by the Albany general term of the supreme court) in *McCardel v. Peck*, 28 How. Pr. R. 120, Miller, J., using this language: "A person may undoubtedly consent to the employment of his name for such a purpose; but if such consent be purely gratuitous, or unless there is some valid agreement binding upon the party who thus gives such consent, it may be withdrawn at the pleasure of such party."

In the case at bar, it is claimed that the plaintiff's laches extended over a period of nine years.

The proof upon this head, however, is somewhat vague, and certainly it is not of that clear and convincing character which would justify a court of equity in shutting its doors against the plaintiff and refusing any relief. Governor Straw, the plaintiff's agent or manager at the works, says that all that was known upon the subject of infringement was the occasional receipt of a letter from some party contemplating a purchase of such prints, and that these letters were immediately forwarded to Messrs. Gardner Brewer & Co., the selling agent of the company. He could not give the date when the first letter was received, but thought it was probably some ten years before his examination (which took place upon the 10th of December, 1875), though it might have been more. If he was correct about this, it would indicate that the first notice was sometime in the latter part of the year 1865, and as this suit was brought in April, 1869, the delay would be reduced to something over three years. It is quite evident that the officers and employees of the company knew very little about the sale of the goods, and had few if any particulars respecting the infringements. Indeed, when Governor Straw was interrogated as to whether he understood that the letters referred to "*Amoskeag prints*," his reply was that "*he must have*;" and, he added, "I was so ignorant as not to know but that some of our people put them on some class of goods. In fact the manufacture of goods and sale of goods are distinctly separate, and there is very little connection with my business and the selling house."

Then the treasurer and agent of the company at Boston testified that he first knew that the defendants were using the name "*Amoskeag*" about the time of the commencement of this suit, adding, however, "I don't mean to say that I may not very often have heard of it, but I left that entirely to the selling agents."

Mr. Bremer, one of the firm of Gardner Brewer & Co., the selling agents, testified that he could not remember the date when he first heard

that Garner & Co. were selling prints with the name "Amoskeag" upon them, but that it was not very long before the commencement of this action, but whether a year, or six months, or five years before he could not answer with any degree of certainty, because his memory did not serve him in this matter.

Looking at all the testimony in the case, there can be no doubt that the plaintiff has exhibited a degree of inactivity which would render it inequitable to compel the defendants to account for the profits. Further, it must be conceded that Gardner Brewer & Co. probably knew from the beginning what was being done by the defendants, but that fact is not established.

Neither upon the facts nor the law, therefore, has a case been made out which would justify a dismissal of the complaint.

In the first place, there are none of the features of an estoppel. The plaintiff did not induce another to incur serious expenditure, by keeping back a right which it intended at some future time to assert. Here the expenditure was confessedly limited to the mere printing of the labels.

In the next place, the plaintiff is not only seeking to enjoin the application of its trade-mark, but, as we have seen, the unlawful use of its name. It might well be, in the case of a mere mark, that the court would say to the grossly negligent suitor: The question of your right to restrain the application of that mark to a variety of cotton goods in which hitherto you have not dealt, is a sufficiently close one. You have solved that question, adversely to yourself, by your extreme laches. The question really is not whether your laches could prevent your obtaining relief against the application of your mark to goods in which you *have* dealt, and on which you *have* stamped it. By not moving sooner, you have in effect admitted *that you never intended to apply THAT MARK to the other variety*, and that its application thereto by another was a matter which did not concern you.

But such a process of thought would be inapplicable to an effort like the present, for laches can never have the effect of a concession that a person will not extend the use or the application of *his name*, nor can it confer upon the wrong-doer the right to build up and establish a business in another's *name*.

There is still another reason, and that is, that the defendants will not suffer any considerable loss by refraining from the use of the word "Amoskeag." They have not built up any special business by its use. The term "Amoskeag prints" has no peculiar significance, as it has been applied by them. The fluctuations of its use have already been adverted to. If the defendants had consistently applied it to some one style of prints, until buyers had learned to purchase without examination, at least as to quality, there would be plausibility in the complaint on this head. But the fact is, that the defendants manufacture every year an immense quantity of prints to which, as may suit their convenience or the exigencies of their trade, they apply from time to time, quite a number of different names. Sometimes they drop old names and take new, again they apply old names to new uses, and *vice versa*. The point is the satisfactory disposition of the great bulk of their annual stock; it is immaterial under what names or tickets. Even when the preliminary injunction in

this case was served, its injury, which at the time was greatly exaggerated, consisted simply in the necessity for the removal of Amoskeag tickets and the sale of the goods under the defendants' own name.

This, too, is a sufficient answer to the suggestion that, should the plaintiff take advantage of the occasion to extend its industry to the production of calicoes, it would necessarily involve the appropriation "of the fruits of the defendants' industry, skill, and capital." On the contrary, the plaintiff would have to contend against and surmount the difficulties resulting from the manner in which the defendants have applied the word "Amoskeag;" and it would probably secure the same high and steady position for its prints which it has for its other cotton goods more readily and speedily if the defendants had never used the word.

There is, therefore, no just reason why the injunction, at least, should be refused, upon the ground of laches.

It was properly refused, *pendente lite*. The plaintiff's case was not so clear as to warrant the interference of the court before the hearing upon the pleadings and proofs. As to the correctness of that interlocutory decision, there can scarcely be two opinions; that is, as to the result. Much of the reasoning upon the general merits of the case was unnecessary, and it certainly is not binding upon the special term, sitting to try the issues, especially as the facts fairly deducible from the testimony now before the court differ in many respects from what appeared in the *ex parte* affidavits read upon the motion.

There must, therefore, be judgment for the plaintiff, enjoining the defendants from the use of the word "Amoskeag," but without damages or account of profits, and, under all the circumstances of the case, without costs.

SUPREME COURT OF THE UNITED STATES.

[OCTOBER TERM, 1876.]

WHETHER CONTRACT IS USURIOUS, A QUESTION OF FACT. — LEX LOCI CONTRACTUS.

COCKLE v. FLACK.

1. Where a commission merchant in Baltimore advanced to a pork packer in Peoria \$100,000, for which he was to receive interest at the rate of 10 per cent. per annum, and a fixed commission for the sale of the product, to be paid whether it was sold by the commission merchant or not, it was properly left to the jury to decide, on all the facts, whether or not the commissions were a cover for usury, or were an honest contract for commission business, in connection with use of money.
2. The express agreement of ten per cent. is not usurious, because lawful in Illinois, though not so in Maryland.

IN error to the circuit court of the United States for the Northern District of Illinois.

Mr. Justice MILLER delivered the opinion of the court.

Plaintiffs in error were engaged in the business of packing pork in Peoria, Illinois, and the defendants were commission merchants at Baltimore, in the fall of 1872, when the contract was made which is the foundation of this suit. There had been transactions between the parties the previous year in the line of their business, and with reference to the packing business of the approaching season this agreement was made by letter. The substance of it is that defendants should advance to plaintiffs, as it was needed, the sum of \$100,000, which they were to invest in the hog product, at the rate of 80 per cent. of the money so advanced, and 20 per cent. of the money put into the purchase by plaintiffs. Defendants were to have interest on the money advanced at the rate of 10 per cent. per annum. The product was to be shipped to them for sale, and they were to have 2½ per cent. commission on the amount, if sold within sixty days, and 1 per cent. commission for every thirty days it was carried thereafter. The contract gave to plaintiffs the right to sell for themselves without sending to defendants, but the latter were to have their commissions all the same.

When the product had all been sold out, and an account rendered, a balance was found to be due defendants, for which they brought this suit and recovered a judgment of \$7,054.48.

It appears by the bill of exceptions that this balance was mainly if not wholly made up of the commissions charged on sales *not* made by defendants, of products which never came to their possession, and the recovery was resisted on the sole ground that these commissions were a device to cover usurious interest.

The charge of the court to the jury on this point was to the effect that the transaction was not necessarily usurious; that defendants being engaged in the commission business, which required the use of money, might loan their money at lawful rates of interest to such parties, and on such terms, that it would bring to them also the business which would grow out of the investment of it; that if the contract was made only with the honest purpose of securing in addition to interest the profits incidental to handling the product as commission merchants, it was not usurious; that on the other hand such a contract might be used as a mere evasive device to cover usurious interest, and it left it to the jury to say from all the circumstances whether this were so.

There can be no question that, on the general doctrine as to the line which marks the division between an honest transaction and a usurious cover, the charge of the court was correct, and that it is in this class of cases the province of the jury, in jury trials, and of the chancellor in suits in equity, to determine on a full consideration of all the facts whether it be the one or the other.

But counsel for plaintiffs argue that as to these commissions, which defendants never earned by sale of the property, or by handling it, and as to which they were put to no cost or inconvenience, there can be no other consideration but the use of the money, and they are necessarily usurious.

It must be confessed that the argument has much force. But we are of opinion that it is not so conclusive that the court ought to have held as matter of law that it was usury.

It is to be considered that defendants were engaged in a business which was legitimate, and in which both custom and sound principle authorized

the joint use of their money and their personal service, increased in value by their character for integrity and experience. To both these sources they looked for their profits, and they were necessarily united.

It was a necessity of their trade, and it was lawful for them while loaning their money at a specified rate of interest, to stipulate with the parties to whom it was loaned for the incidental advantages of acting as commission merchants for the sale of the property in which the money was to be invested by the borrower. They had the right also to require as a condition of the loan that it should be invested in such property as would require their services in selling and handling it. All this is admitted.

We see no reason why the parties could not go a step further, and stipulate that if for any reason operating in the interest of the borrower he should prefer to become his own broker or commission merchant, or to sell at home, he should pay the commission which the other had a right to contract for and receive. Like the port pilot, and other instances, they were ready and willing to perform. They had a place of business, clerks, and their own time and skill, ready to devote to the plaintiffs' business. In that business they had a large pecuniary interest. They had loaned their money without requiring any other security than the obligation of the other party, except that which might arise from the property coming to their hands. To make this property a sufficient security the contract required of the plaintiffs that they should invest in the same property \$20 of their own money to every \$80 borrowed of defendants. The relinquishment of this right to control the sale of the property was a good consideration for the commissions which they would have made if they had sold it.

While it was possible to make such a transaction a mere cover for usury, it was at the same time possible that the contract was a fair one, in aid of defendants' business, a business in which they were actually and largely engaged, and in which lending money was the mere incident and not the main pursuit.

It was, therefore, properly left to the jury to say whether, under all the circumstances, it was or was not a usurious transaction, under instruction to which we can see no objection.

We do not think the express reservation of ten per cent. interest makes the contract usurious, because the law of Maryland forbids more than six. The contract was quite as much an Illinois contract, where ten per cent. is lawful, as a Maryland contract, and the former is the law of the forum. The ruling of the court below was in accord with what this court had held in *Andrews v. Pond*, 13 Peters, 65.

The judgment of the circuit court is affirmed.

SUPREME COURT OF NEW HAMPSHIRE.

(To appear in 57 N. H.)

PRINCIPAL AND AGENT. — ESTOPPEL BY PRINCIPAL TO DENY AUTHORITY OF AGENT TO SELL.

NIXON v. BROWN.

The plaintiff employed one M. to buy a horse for him. M. bought the horse, paying for it with the plaintiff's money, and took a bill of sale in his own name. Afterwards he informed the plaintiff of what he had done, and showed him the bill of sale; but the plaintiff permitted him to go away with the horse and bill of sale still in his possession. M. thereupon went to the defendant, who had no knowledge of the agency, showed him the bill of sale, sold him the horse for cash, and absconded. *Held*, that the plaintiff could not recover in an action of trover for the horse.

ONE Charles Mason, who resided in Whitefield, N. H., purchased the horse in question of one Hubbard, who resided in Dalton, N. H., for the plaintiff, who furnished the money (\$95.00) to Mason to pay for the same. Mason did not disclose to Hubbard that he was purchasing for the plaintiff, but, on the contrary, gave Hubbard to understand that he was acting for himself, and took a bill of sale of the horse from Hubbard to himself. Afterwards Mason informed the plaintiff that he had made the purchase, and showed him the bill of sale, and told him he could give him a bill of sale, and that would make it all right, but did not do so; and it was then arranged that Mason should bring the horse to the plaintiff on the following Monday — this being on Saturday; and it was further arranged that Mason, after he had brought the horse to the plaintiff, should take him and keep him, and drive him to better break him. Mason never brought the horse to the plaintiff, but on Tuesday — having previous to said Saturday showed the horse to the defendant, who was then stopping at Whitefield, and represented to the defendant that he, Mason, owned him — he showed the defendant the bill of sale from Hubbard, and finally sold the horse to the defendant, and received in payment \$75.00, and then left for parts unknown. The report of the referee to whom the case was sent was to this effect.

Both parties moved for judgment, and the court ordered judgment for the plaintiff, to which the defendant excepted.

LADD, J. I am of opinion that the defendant's exceptions in this case must be sustained, and that judgment should be entered in his favor upon the report of the referee. The general rule, that the possession of goods by a bailee, or servant, gives him no power to make any disposition of them, except by virtue of actual authority received from the owner (Perley, J., in *Folsom v. Batchelder*, 22 N. H. 51), is so well settled as to be quite elementary. But there are several exceptions to this rule, quite as well settled, and quite as well understood as the rule itself. One relates to money, bank bills, checks, and notes payable to the bearer, or transferable by delivery. The cases establishing this exception, commencing, perhaps, with *Miller v. Race*, 1 Burr. 452, are very numerous,

and quite uniform. Another exception, in England, relates to sales in market overt. But as we have no markets overt in this state (*Bryant v. Whitcher*, 52 N. H. 158), that exception has no existence here. Another is where the possession of the bailee, from the nature of his employment, implies an authority to sell, — as, when goods are left with an auctioneer or factor, a sale by such bailee, though he had no actual authority, will bind the owner. Perley, J., in *Folsom v. Batchelder*, *supra*, p. 51, and cases cited. The reason given for this last exception is, that the owner has allowed the bailee in possession to hold out the appearance of an authority to sell, which would deceive and defraud the fair purchaser if the law allowed the validity of the sale to be questioned. This statement of the reason, thus clearly and succinctly given by the late Chief Justice Perley, suggests the ground of my decision in this case. The facts, specially stated by the referee, show most clearly to my mind that the plaintiff allowed Mason, while he retained possession of the horse, to hold out the appearance of ownership in himself, and so of an authority to sell, which would deceive and defraud a fair purchaser if the law permitted the validity of the sale to be questioned. . . .

At the argument Mr. Carpenter (counsel for plaintiff) put this supposed case: A having sold his horse to B, delivers the animal, together with a bill of sale running to B, to his servant or agent, to be carried to the vendee. But the servant on the way, finding a customer for the horse, produces the bill of sale, represents himself to be the person there named as purchaser, and sells the horse to an innocent third person. Of course there could be no question of the right of the owner to recover his property, under that state of facts, against such innocent purchaser. The cases covering this point are numerous, of which *Saltus v. Everett*, 20 Wend. 267, is a good example. In that case it was held that the purchaser of part of a cargo of a vessel was not protected against the claims of the real owner, although the purchase was made under a bill of lading, regular and fair on its face, — it appearing on the trial of the cause that the master of the vessel, in which the goods were originally shipped, had *fraudulently*, at an intermediate port, transshipped the goods into another vessel, and procured a bill of lading in his own name, which he transferred to his agents, the vendors.

If the plaintiff had not been informed of the fact that Mason had taken a bill of sale of the horse in his own name, and with that knowledge permitted him to go forth clothed with all the indicia of ownership, and so completely armed for the commission of a fraud, the case supposed in argument, and that class of cases of which *Saltus v. Everett* has been referred to as the type, might have application. As it is, I think they do not apply at all. I regard this act or omission, if it should be called an omission, of the plaintiff as decisive of the case; and I am therefore of opinion that there should be judgment on the report for the defendant.

Exceptions sustained.

SUPREME COURT OF PENNSYLVANIA.

[NOVEMBER, 1876.]

CRIMINAL LAW. — MURDER. — IMPETUOUS TEMPER. — PROVOCATION.

GREEN v. THE COMMONWEALTH.

The ingredients necessary to constitute murder in the first degree having been proved, the circumstance that the killing was preceded by a verbal dispute and by violent threats uttered by the deceased will not reduce the grade of the offence.

The fact that an isolated part of a charge may be open to doubt, when read without regard to the other parts thereof, is not sufficient ground for reversal.

At the trial below counsel for the prisoner requested the court, *inter alia*, to charge: "That to constitute murder in the first degree, there must be a design and intention to kill at the time the homicidal act is committed, and this intention must be a fully formed purpose to kill, with so much time for deliberation and premeditation as to convince the jury that this purpose is not the immediate result of rashness and impetuous temper." The court (Sterrett, P. J.) declined to affirm this point as a whole, saying: "It is correct with the exception of the qualifying clause with which it closes. To constitute murder of the first degree, there must be a design and intention to kill at the time of the homicidal act, and this intention must be a fully formed purpose to kill, with sufficient time for deliberation and premeditation, as already explained in the general charge, but the *purpose to kill*, necessary to constitute murder in the first degree, may sometimes be 'the immediate result of rashness and impetuous temper.' A rash and impetuous temper is no excuse, unless it has been aroused by adequate legal provocation, as explained in the general charge, and the intention to kill has been formed in the heat of passion thus generated." The learned judge charged, *inter alia*, as follows: "All murder, not of the first degree, is necessarily murder of the second degree, and includes all unlawful killing under circumstances indicating depravity of heart, and a disposition of mind, regardless of social duty, where no intention to kill exists or can reasonably be inferred. Therefore in all cases of murder, if no intention to kill can be inferred or collected from the circumstances, the verdict must be murder of the second degree.

"*Manslaughter* may be defined to be the unlawful killing of another without malice, express or implied, which may be voluntarily done in a sudden heat of passion, or involuntarily, in the commission of an unlawful act. Voluntary manslaughter often so nearly approaches murder that it is necessary to distinguish it clearly. The difference is this: manslaughter is never attended by legal malice or depravity of heart, that condition or frame of mind before spoken of, exhibiting wickedness of disposition, recklessness of consequences, or cruelty. But being sometimes a wilful act, as the term voluntary denotes, it is necessary that the circumstances should take away every evidence of cool depravity of heart or wanton cruelty. Therefore to reduce an intentional blow, stroke, or

wounding, resulting in death, to voluntary manslaughter, there must be sufficient cause of provocation, and a state of rage or passion, without time to cool, placing the accused beyond the control of his reason and suddenly impelling him to the commission of the deed. If any of these be wanting, — if there be provocation without passion, or passion without legal provocation, — or if there be time to cool and reason has resumed its sway, the killing will be murder. But it is not every cause of provocation that is regarded as sufficient or legal. Insulting or scandalous words are not sufficient cause of provocation; nor are actual indignities to the person of a slight and trivial nature. Whenever the act evidences a deadly revenge, and not the mere heat of blood; whenever it is the result of a devilish disposition, and not merely the frenzy of rage, it is not manslaughter, but murder. Passion arising from adequate legal provocation is evidence of the absence of malice."

The jury found the prisoner guilty of murder in the first degree, and sentence of death was pronounced accordingly.

The defendant took this writ, assigning for error, *inter alia*, that "the record and evidence failed to show that the ingredients necessary to constitute murder in the first degree were proven to exist;" and the refusal of the court to affirm the latter part of the above point.

J. C. Graham & J. H. Baldwin, for plaintiff in error.

T. M. Bayne & E. A. Montooth, *contra*.

AGNEW, C. J. Upon a careful examination of the evidence in this case, we find that all "the ingredients necessary to constitute murder in the first degree were proved to exist." The prisoner and the deceased had been upon bad terms, and involved in litigation immediately before the homicide. The former, on the next morning after the lawsuit, had threatened the life of the latter. In the evening of the killing he stopped before the door of the house where the deceased was sitting at supper, and asked the latter what he was going to do about the potatoes — a subject of difficulty between them. This led to an angry altercation, the deceased using bad language, and threatening to give the prisoner a good pounding. The prisoner having started up the road towards home, saying he would bring suit next day, the deceased ran back to the fireplace, picked up a poker, and running out of the house, called to the prisoner to come back, saying if he came he would not go away alive. The prisoner then being some yards up the road, said, "I will come," and started towards the deceased, and, before reaching him, levelled at him a gun he had been carrying in his hands. The latter said, "Shoot if you want to." At the same instant the report and flash of the gun were heard and seen. The deceased fell near the spot where he stood before the house; the sound of a heavy blow was heard, and very soon the prisoner started off towards home. The deceased was found with a large gash in his head; a piece of the gun-barrel, about one foot long, was shortly afterwards found near by; and the broken gun carried off by the prisoner found at his house on the same evening. No one saw the blow struck, yet the sound of it, the broken piece near the spot, the fractured gun, and the cut in the head of the deceased, leave no doubt of the fact. Nor is it very material where and how precisely the blow was struck, as the evidence beyond question proves that the gun was fired before the prisoner reached the deceased,

and the bullet wound was the undoubted cause of death. Still the fact of the blow is important in determining the state of the prisoner's mind, and his disposition towards the deceased. Had the conflict and the blow occurred before the shooting, a different case would have been presented, bearing on the prisoner's state of mind and intention. But here one whose mind had before been inflamed toward the deceased, who had threatened him, levelled a loaded gun and fired at him, at some distance and before the latter had committed an assault upon him, or could have reached him with the poker held in his hand, and found still in it when carried into the house. It is evident, therefore, that there was ample time for the prisoner to frame in his mind the deliberate purpose to shoot the deceased, and to carry this intent out, by levelling his gun and discharging it, when told to shoot. It is no doubt true that he was also irritated by the very bad language of the deceased, but this was no sufficient cause of provocation for taking life; while the turning back of the prisoner when called to come back, his expression as he turned, — "God damn your wicked heart, I have been waiting for that," — walking back towards the deceased, levelling the gun at him, and shooting at the instant the deceased told him to shoot, all evidence a sufficient time to act deliberately, and not under a sudden gust of passion, tearing up reason by the roots and urging him on to a rash and thoughtless deed. These facts, together with the previous state of the prisoner's feelings toward the deceased (his half brother), clearly presented a case where the ingredients of murder in the first degree were proved to exist, and therefore must be submitted to the jury for their judgment. Nor can we say that there was such a strong and reasonable doubt of their existence as to require an acquittal.

But one other assignment of error is worthy of notice. The prisoner's first point is, that to constitute murder in the first degree, there must be a design and intention to kill at the time the homicidal act is committed, and this intention must be a fully formed purpose to kill, with as much time for deliberation and premeditation as to convince the jury that this purpose is not the immediate result of rashness and impetuous temper. The answer affirmed the point in its own language nearly, and the judge added, "but the purpose to kill, necessary to constitute murder in the first degree, may sometimes be 'the immediate result of rashness and impetuous temper.' A rash and impetuous temper is no excuse, unless it has been aroused by adequate legal provocation, as explained in the general charge, and the intention to kill has been formed in the heat of passion thus generated." The first clause of the qualification is perhaps doubtful; yet in view of the whole sentence and of the reference to the explanation given in the general charge, relating to the crime of manslaughter as an offence committed under provocation and passion, we are led to believe that the qualification contained in the answer was intended to guard the jury against a mistake by which they might reduce the offence from murder to manslaughter in the absence of a *legal* provocation, there being a seeming provocation in the bad language of the deceased. In this view we may reasonably conclude that the jury were not misled by the seeming inaccuracy of the first clause in the qualification of the answer. The general charge correctly set before the jury the distinctions in regard to homi-

cide, and drew their attention to the difference between murder and manslaughter. The point, however, was not intended to bring this distinction into view, but rather the frame of mind necessary to the commission of murder in the first degree, that is, the deliberation and premeditation which the act of assembly makes essential to the crime of murder in the first degree. So far as impetuous rage and rashness, followed by the immediate act which takes away life, tend to deprive the prisoner of deliberation and premeditation, and to reduce the homicide from murder in the first to murder in the second degree, the point was pertinent; for it was for the jury, judging upon the evidence, to determine whether the act was a result of a deliberate and premeditated purpose to kill. The time may be short, yet a jury may find that the fully conscious purpose to kill existed. Yet if, on the other hand, by reason of the shortness of the time, and the presence of great rage produced on the instant, and in a moment of impetuous temper a blow is given, a jury may be convinced that it was not the result of a fully formed purpose to kill, but of a rash and hasty impulse, with scarcely a consciousness of any purpose except to do bodily harm to the object of wrath. Hence, though the absence of a legal provocation may prevent the reduction of the crime from murder to manslaughter, the want of the deliberation and premeditation required by the law may reduce the grade of the murder from the first to the second degree. If therefore the learned judge intended the qualification in his answer to the first point to apply to the point itself, it would be inaccurate. But his reference to his general charge conveys the impression that he intended only to guard the jury against a misapprehension, reducing the offence to manslaughter in the absence of a legal provocation. This acquires strength when we remember the facts of the homicide. The prisoner returned at the call of the deceased, and before reaching him, levelled his gun and fired, and this too after the expression, "God damn your wicked heart, I have been waiting for that," excited by the call. No doubt he was angry and provoked by the threats of the deceased; but his anger was the offspring of hate and revenge, and not of that hasty and impetuous rage which for the instant dethrones reason, and impels to the commission of an act of violence with scarcely a consciousness of its own real purpose. To use the language in *Drum's case*, 8 P. F. Smith, 16, the law regards, and the jury must find the actual intent, that is, the fully formed purpose to kill, with so much time for deliberation and premeditation as to convince them that this purpose is not the immediate offspring of rashness and impetuous temper, and that the mind has become fully conscious of its own design. If there be time to frame in the mind fully and consciously the intention to kill, and to select the weapon or means of death, and to think and know beforehand (though the time be short) the use to be made of it, there is time to deliberate and premeditate.

Upon the whole case we discover no substantial error. The judgment of the Court of oyer and terminer is affirmed, and it is ordered that the record be remitted for the purpose of execution.

SUPREME COURT OF THE UNITED STATES.

[MARCH, 1877.]

MUNICIPAL BONDS.—THE VALIDITY OF A MUNICIPAL BOND DEPEND-
ENT UPON THE VALIDITY OF THE ACT UNDER WHICH IT IS ISSUED.

TOWN OF OTTAWA v. PERKINS.
SUPERVISORS OF KENDALL CO. v. POST.

Actions were brought upon certain bonds issued by plaintiffs in error, the town of Ottawa and Kendall County. Evidence was offered in the court below that the statutes in pursuance of which the bonds had been issued, had not been passed in the exact form and manner prescribed by the state Constitution. The testimony was excluded, the court holding that the facts showed that the holder of the bonds was a *bonâ fide* purchaser without notice of any objection to their validity; that the first instalment of interest had been paid at maturity; that the law had been duly published among the printed statutes of the state; and that the defendant was, therefore, estopped from offering any evidence that the law was not passed according to the provisions of the Constitution. *Held*, that this view was erroneous; that there can be no estoppel in the way of ascertaining the existence of a law; and that as, under the decisions of the state court of last resort, the evidence was admissible to prove that the law as published was not a law it should have been received.

WAITE, C. J., and CLIFFORD, SWAYNE, and STRONG, JJ., dissenting.

IN error to the circuit court of the United States for the Northern District of Illinois.

Mr. Justice BRADLEY delivered the opinion of the court.

The first of these actions was brought by Perkins, the plaintiff below, to recover the amount due upon two negotiable bonds of the town of South Ottawa, in the usual form, for one thousand dollars each, made payable to the Ottawa, Oswego, and Fox River Valley Railroad Company, or bearer, in three years from July 1, 1869, with coupons for the semi-annual payment of interest attached. They each contained recitals as follows:—

“ This bond is one of a series of 20 bonds bearing even date herewith, each for the sum of \$1,000, . . . and is issued in pursuance of an election held in said town, on the 8th day of October, 1866, under and by virtue of a certain act of the Legislature of the State of Illinois, approved February 18, 1857, entitled ‘ An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads,’ . . . at which election a majority of the legal voters participating in the same voted ‘ for subscription ’ to the capital stock of said railroad in the sum of twenty thousand dollars, and to issue the bonds of said town therefor; and the said election was by the proper authorities duly declared carried ‘ for subscription,’ previous application having been made to the town clerk of the town, and said clerk having called said election in accordance therewith, and having given due notice of the time and place of holding the same, as required by law and the act aforesaid.”

The second action was brought on a bond issued by the county of Kendall, in Illinois, bearing date the 4th day of May, 1869, in aid of the same

railroad, and by virtue of the same act of the legislature, and containing substantially the same recitals, *mutatis mutandis*, as those in the Ottawa bonds, except that the election authorizing the issue of the bonds is stated to have been held on the 30th day of March, 1869. The facts in the two cases are, in other respects, substantially the same:

The only authority claimed for issuing these bonds is the act referred to in the above recital therein. If no such act was ever passed by the Legislature of Illinois the bonds are void. A municipal corporation cannot issue bonds in aid of extraneous objects without legislative authority, of which all persons dealing with such bonds must take notice at their peril. *Pendleton Co. v. Amy*, 13 Wall. 304; *Kennicott v. Supervisors*, 16 Wall. 465; *St. Joseph v. Rogers*, 16 Wall. 659; *Coloma Town v. Eaves*, 92 U. S. 484; *S. C.* 3 Am. L. T. R. N. S. 235.

It is insisted on the part of the plaintiffs in error in these cases, that the law relied on for authority to issue the bonds in question was never passed, no entry of its passage appearing on the Journal of the Senate of Illinois.

The Constitution of Illinois, adopted in 1848, contains the following provisions:—

“Art. III. sec. 1. The legislative authority of the state shall be vested in a general assembly, which shall consist of a senate and house of representatives, both to be elected by the people.”

“Sec. 3. Each house shall keep a journal of its proceedings, and publish them.”

“Sec. 21. On the final passage of all bills, the vote shall be by ayes and noes, and shall be entered on the journal; and no bill shall become a law without the concurrence of a majority of all the members elect in each house.”

The Constitution also provides that all bills passed shall be signed by the speakers of the two houses, and approved and signed by the governor, or, in case of his refusal, shall be repassed by a majority elected to each house. The general laws of the state provide for depositing all acts of the legislature, and the original journals of the two houses, in the office of the secretary of state, who is charged with having them printed; and the printed statute books are made evidence of the acts contained therein.

In the construction of the constitutional provisions above recited, the supreme court of Illinois, by a long course of decisions, has held that it is necessary to the validity of a statute that it should appear by the legislative journals that it was duly passed in the manner required by the Constitution.

As early as 1853, it was decided, in *Spangler v. Jacoby*, 14 Ill. 299, that it was “competent to show from the journals of either branch of the legislature, that a particular act was not passed in the mode prescribed by the Constitution, and thus defeat its operation altogether. The Constitution requires each house to keep a journal, and declares that certain facts, made essential to the passage of a law, shall be stated therein. If those facts are not set forth, the conclusion is that they did not transpire. The journal is made up under the immediate direction of the house, and is presumed to contain a full and complete history of its proceedings. If a certain act received the constitutional assent of the body, it will so appear

on the face of its journal. And when a contest arises as to whether the act was passed, the journal may be appealed to, to settle it. It is the evidence of the action of the house, and by it the act must stand or fall. It certainly was not the intention of the framers of the Constitution, that the signatures of the speakers and the executive should furnish conclusive evidence of the passage of a law. The presumption indeed is, that an act thus verified became the law pursuant to the requirements of the Constitution, but that presumption may be overthrown. If the journal is lost or destroyed, the presumption will sustain the law, for it will be intended that the proper entry was made on the journal. But when the journal is in existence, and it fails to show that the act was passed in the mode prescribed by the Constitution, the presumption is overcome and the act must fall."

This case was followed, in 1855, by *Turley v. County of Logan*, 17 Ill. 151. There, a law was supposed to have been passed at the session of the legislature in 1853, for the removal of the seat of justice of Logan County, by a vote of the people. In the fall after, a vote was taken, which resulted in favor of the removal. Turley and his associates then filed their bill to restrain the county officers from erecting county buildings at the new location, on the ground that, as appeared by the journal, the act had not been read in the house of representatives the full number of times required by the Constitution, and so was no law. The fact being as alleged, the injunction was, in the first instance, allowed, but afterwards, in February, 1854, the same legislature met in extra session, and, on recollection of members, and by the manuscript notes of the clerk, the house of representatives amended its journal so that it showed the bill had been read the requisite number of times. Thereupon, the supreme court, when the case came there, while recognizing fully the authority of *Spangler v. Jacoby*, affirmed a decree dissolving the injunction and dismissing the bill, for the reason that it was within "the power of the same legislature, at the same or a subsequent session, to correct its own journals, by amendments which show the true facts as they actually occurred."

The same question was also considered by the same court in *Prescott v. The Trustees of the Illinois & Michigan Canal*, 19 Ill. 324, decided in 1857. There, Prescott and Arnold were entitled to purchase at the appraised value, certain lots in Chicago, which had been appraised twice, and the point to be decided was whether they should pay according to the first or second appraisal. The second appraisal was made under a law supposed to have been passed February 14, 1851, but which the journals showed had never in fact passed either branch of the general assembly. Accordingly, the court held, upon the authority of *Spangler v. Jacoby*, that the second appraisal was invalid and that the parties had the right to purchase under the first.

In the case of *The Supervisors of Schuyler County v. The People*, 25 Ill. 181, which came before the court in 1860, it was objected that the senate journal did not show that the bill incorporating the railroad company was read three times in that body before it was put on its final passage, but the court, while still approving *Spangler v. Jacoby*, held that the Constitution did not require the fact that the bill had been read three times to be entered on the journals, and consequently, that the validity of the law could not be impeached on that ground.

In 1864, in the case of *The People ex rel. Barnes v. Starne*, 35 Ill. 121, an application was made for a mandamus to compel the treasurer of the state to countersign, register, and pay a warrant issued upon him in favor of Barnes, the relator, by the auditor of public accounts. The warrant was issued upon the authority of what was supposed to be a statute of Illinois, approved February 14, 1863, as compensation for transporting and bringing home certain wounded soldiers belonging to the state; but it being shown that the journal of the house of representatives did not contain entries to the effect that the bill was passed by a majority of the members elect, or that the vote was taken by ayes and noes upon the final passage, the mandamus was refused. In the opinion of the court the authorities are extensively reviewed and the rulings in the previous cases reaffirmed.

These cases were all decided before the issue of the bonds sued on in this case. But since that time two cases have arisen under the very law now in question, in which the supreme court of Illinois has decided that it was never passed, and is not an act of the legislature of that state. The first of these cases, *Ryan v. Lynch*, 68 Ill. 160, was decided in 1873. Certain tax-payers of the town of Ottawa sought to enjoin the tax-collector from collecting a tax which had been levied to pay interest upon bonds issued in aid of the Ottawa, Oswego, and Fox River Railroad Company, upon the ground that the act under which the bonds were issued, that of February 18, 1857 (the same which is now under consideration), had not been enacted in conformity with the requirements of the Constitution. At the hearing in the court below it was proven that the journal of the senate did not show that the bill had ever passed that body. Upon this proof the court, recognizing the authority of *Spangler v. Jacoby*, and other cases which followed it, granted the injunction asked for. In the supreme court, on appeal, it was insisted that the decree ought to be reversed, because the bondholders had not been made parties. The objection was overruled and the action of the court below affirmed.

Following this is the case of *Miller & Paddock v. Goodwin*, 7 Chicago Legal News, 294, not yet reported in the regular series of the reports of the state. It being shown in this case, as in *Ryan v. Lynch*, that the journals did not contain the requisite evidence of the passage of the law, it was again adjudged invalid. This was in January, 1875. An effort was made in this last case to impeach the transcript of the legislative journals, but it was unsuccessful. The court repeated what it had said in the case of *Ryan v. Lynch, supra*, using this language: "The bill never became a law, and the pretended act conferred no power. It follows that the bonds were not merely voidable, but that they were absolutely void for want of power or authority to issue them; and consequently no subsequent act or recognition of their validity could so far give vitality to them as to estop the tax-payers from denying their legality." This opinion, it is true, was delivered after the trial of the case now before us. But it goes to show that up to the very moment of that trial there had been no vacillation in the state court as to the construction and effect of the Constitution of Illinois.

When the cases now under consideration came on for trial in May,

1874, the defendants below offered to prove, by the journals of each house of the legislature, that there was no entry in the same of the passage by the senate of the Act of February 18, 1857. The testimony was objected to and ruled out. Substantially the same questions were raised by demurrer to a plea. The ground of this decision seems to have been that the holder of the bonds was a *bonâ fide* purchaser of them without notice of any objection to their validity; that the first instalment of interest was paid at maturity; and, therefore, that the defendant was estopped from offering any evidence to show that the act was not passed, the same having been duly published among the printed statutes as a law, and being therefore *primâ facie* a valid law: in other words, that although the act might not have been duly passed, the town, under the circumstances of the case, was estopped from denying its passage.

We cannot assent to this view. There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a state is a law or it is not a law, according as the truth of the fact may be, and not according to the shifting circumstances of parties. It would be an intolerable state of things if a document purporting to be an act of the legislature could thus be a law in one case and for one party, and not a law in another case and for another party; a law to-day, and not a law to-morrow; a law in one place, and not a law in another in the same state. And whether it be a law, or not a law, is a judicial question to be settled and determined by the courts and judges. The doctrine of estoppel is totally inadmissible in the case. It would be a very unseemly state of things, after the courts of Illinois have determined that a pretended statute of that state is not such, having never been constitutionally passed, for the courts of the United States, with the same evidence before them, to hold otherwise.

It is declared by the judiciary act as a fundamental principle "that the laws of the several states, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." Sec. 34. And this court has always held that the laws of the states are to receive their authoritative construction from the state courts, except where the federal Constitution and laws are concerned; and the state constitutions, in like manner, are to be construed as the state courts construe them. This has been so often laid down as the proper rule, and is in itself so obviously correct, that it is unnecessary to refer to the authorities.

If, therefore, the law in question had never been passed upon by the state courts, the courts of the United States would nevertheless be bound to give to the Constitution of Illinois the same construction which the state courts give to it; and to hold a pretended act of the legislature void and not a law which the state courts would hold to be so. Otherwise we should have the strange spectacle of two different tribunals, having co-ordinate jurisdiction in the same state, differing as to the validity and existence of a statute of that state without any power to arbitrate between them. In speaking, however, of their jurisdiction as being co-ordinate, it is only meant that one has no power to enforce its decisions upon the other. As a matter of propriety and right, the decision of the state

courts on the question as to what are the laws of the state is binding upon those of the United States.

But the law under consideration has been passed upon by the supreme court of Illinois and held to be invalid. This ought to have been sufficient to have governed the action of the court below. In our judgment it was not necessary to have raised an issue on the subject except by demurrer to the declaration. The court is bound to know the law without taking the advice of a jury on the subject. When once it became the settled construction of the Constitution of Illinois, that no act can be deemed a valid law unless, by the journals of the legislature, it appears to have been regularly passed by both houses, it became the duty of the courts to take judicial notice of the journal entries in that regard. The courts of Illinois may decline to take that trouble unless parties bring the matter to their attention; but, on general principles, the question as to the existence of a law is a judicial one, and must be so regarded by the courts of the United States.

This subject was fully discussed in the case of *Gardner v. The Collector*, 6 Wallace, 499. After examining the authorities the court in that case lays down this general conclusion, "that whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which in its nature is most appropriate, unless the positive law enacted a different rule." 6 Wall. 511.

Of course any particular state may by its constitution and laws prescribe what shall be conclusive evidence of the existence or non-existence of a statute; but the question of such existence or non-existence being a judicial one in its nature, the mode of ascertaining and using that evidence must rest in the sound discretion of the court on which the responsibility rests in any particular case.

Not only the courts, but individuals, are bound to know the law, and cannot be heard to plead ignorance of it. The holder of the bonds in question can claim no indulgence on that score; and can take no advantage from the allegation that he is a *bond fide* purchaser without notice. He would, it is true, be precluded from doing so on another ground; namely, the want of any legislative authority in fact in the town to issue the bonds in question. Want of such authority is a fatal objection to their validity, no matter under what circumstances the holder may have obtained them.

Thus far we have not adverted to the argument attempted to be drawn by the defendants in error from the fact that the act in question was referred to in two subsequent acts of the legislature as an existing law. One of these was passed on the 27th day of March, 1869, entitled "An act to amend an act, entitled 'An act to incorporate the Ottawa, Oswego, and Fox River Valley Railroad Company.'" This act authorized the company to build a railroad from the town of Wenona to the city of Peoria, and, by the 2d section, it was enacted "that any city, county, town, or township near to or through which said road is now or may hereafter be

located is hereby authorized to subscribe to the capital stock of said railroad, upon the terms and conditions prescribed in an act entitled 'An act to authorize certain cities, counties, towns, and townships to subscribe to the stock of certain railroads' in force February 18, 1857." The title here recited is not the title of the act in question. It differs from it in several respects, though this was probably the one that was intended to be referred to. Supposing it to have been the one referred to, it is not pretended that this Act of March 27, 1869, embraces the town of South Ottawa, or the county of Kendall, whose bonds are the subject of the present suits. But it is urged that the reference to the Act of 1857 is such a recognition of that act as to give it validity if it had none before. This was certainly not the purpose of the Act of 1869, nor do we think that such was its effect. The legislature could not thus, in 1869, give validity to a void act as an act passed in 1857, which was not constitutionally passed in that year; for that would be an evasion of the Constitution. It could at most give it vitality as a new act from the date of the Act of 1869. But this it does not profess to do; it only adopts its provisions for the purposes of the act then passed. And if the legislature of 1869 could have validated all proceedings had under the supposed Act of 1857, it did not do so. It did not profess to do it. No such purpose is indicated in it. The most that can be said is, that in referring to the Act of 1857, the legislature inadvertently supposed that it had been regularly passed. Whether such inadvertence was the result of a false suggestion by interested parties, or otherwise, is of no consequence. No intent to validate and establish the Act of 1857 as a law can be gathered from the terms of the Act of March 27, 1869. To give to such a reference in a subsequent act as is here relied on, the effect of validating, or reviving, or vitalizing a void or repealed statute, when no such intention is expressed, would be dangerous and would lay the foundation for evil practices. The legislature might in this way be entrapped into the enactment or reenactment of laws when it had no intention, or even suspicion, that it was doing so.

The other act relied on was passed on the 20th day of April, 1869, and is entitled "An act to amend an act entitled 'An act authorizing certain cities, counties, towns, and townships to subscribe to the stock of certain railroads' in force February 18, 1857;" being the act in question, if the words "in force" are construed to refer to the date of its supposed passage. This amendatory act declares that in addition to the cities, counties, towns, and townships authorized by the said act to which this is an amendment, to subscribe to the stock of the Ottawa, Oswego, and Fox River Valley Railroad, the following portions of cities, counties, towns, and townships be authorized to subscribe to the capital stock of said railroad in manner as provided in said act except as hereinafter provided. The act then proceeds to designate the portions of towns referred to.

The same observations apply to this act which have been made in regard to the Act of March 27, 1869. It does not profess or purport to give any new force or validity to the supposed Act of 1857, or to validate any proceedings had under that act. It takes for granted, mistakenly as we have seen, that the act was duly passed, and does nothing more.

The last mentioned act could not, in any event, by any prospective effect, aid the holders of the bonds in suit; for the elections called to

authorize their issue were held before this act was passed, as appears by the recitals in the bonds themselves. Indeed the election authorizing the Ottawa bonds was held in 1866, long before the passage of either of the acts referred to. And in the absence of any expression in the laws themselves, evincing such an intention, it can hardly be claimed that these laws gave any retroactive validity to elections which were without authority and void when they were held.

It is to be observed that these statutes were before the supreme court of Illinois when deciding the case of *Miller & Paddock v. Goodwin*, being set up and relied on in the answer of the defendants in that case; but the court evidently did not regard them as having the effect claimed. The bonds were held to be void, and the collection of taxes to pay them was perpetually enjoined.

We do not perceive that the act of Congress prescribing the mode in which the public acts, records, and judicial proceedings in each state shall be authenticated so as to take effect in every other state, has any bearing whatever on the case. The authentication thus provided for was intended as evidence only of the existence of such acts and records, and not to give them any greater validity or effect than that which they had in the state from which they were thus accredited. The act expressly declares that, when thus authenticated, they shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence they are taken. It merely provides a mode of proving public records, leaving them when proven invested with the same force and effect (and no other) which they have at home. But when a court of the United States is held in any state, it is bound to know the laws of such state the same as the domestic courts are.

The judgments of the circuit court in the two cases under consideration are reversed, and the record remanded with directions to award a *venire facias de novo*.

Mr. Chief Justice WAITE dissenting. I am unable to agree to the judgment which has been rendered in this case. There is no doubt but that the construction which the courts of Illinois have uniformly given the Constitution of the state is binding upon us as a rule of decision. The difference between me and the majority of my brethren is as to the construction that has been given, not as to its effect when ascertained. After a careful consideration of all the cases to which our attention has been directed, I am forced to the conclusion that the question has been made by the courts of Illinois one of fact and not of law. The majority of this court think it has been made one of law. Such a construction might and probably would be more logical, but our duty is to ascertain what has been decided, not what should have been.

The case of *Spangler v. Jacoby* is the first of a long series of cases in which this question has been considered, and so far as I have been able to discover, little has been done since, except to reaffirm and apply what was there decided.

Looking, then, to that case, we find that *prima facie* an act enrolled, signed by the speakers of the two houses, approved by the governor, deposited in the office of the secretary of state, and published under his superintendence among the laws certified by him, is a valid law. The

language of the court is (p. 800): "The act in question was signed by the speaker of the two houses, and it received the assent of the executive. *Prima facie*, therefore, it became a law." Afterward, in *Illinois Cent. R. R. Co. v. Wren*, 43 Ill. 79, it is said "the laws certified by the secretary of state and published by the authority of the state, must be received as having passed the legislature in the manner required by the Constitution, unless the contrary clearly appears. And again, no longer ago than last year, in *Larrison v. P. A. & D. R. R. Co.* 77 Ill. 18, "if we find a law signed by the speakers of the two houses and approved by the governor, we must presume that it has been passed in conformity to all the requirements of the Constitution, and is valid until the presumption is overcome by legitimate proof."

This law was enrolled; signed by the speakers of the two houses; approved by the governor; deposited in the office of the secretary of state; published by him with the requisite certificate among the laws passed at the session of the legislature in 1857; acquiesced in by the people of the state as a valid law for more than thirteen years after its publication; accepted and acted upon by the inhabitants of South Ottawa in October, 1866, when they voted under it for a subscription to the stock of the railroad company and authorized the issue of the bonds of the township in payment; recognized as a valid and existing law by the legislature of the state, March 27, 1869, and April 20, 1869, when laws were passed referring to it as in force and amending it; and finally acted upon by the officers of the township when, in obedience to the vote of the inhabitants, they subscribed to the stock of the railroad company and issued the bonds authorized by the act in payment.

In this condition of things the courts were bound to take judicial notice of it as a law in force. This was expressly decided in *Illinois Cent. R. R. Co. v. Wren*, *supra*, where it was said, "Although we take judicial notice of all acts of the legislature signed by the governor and found in the office of the secretary of state, and although for some purposes we may take judicial notice of the legislative journals, yet it is not our province, at the suggestion or request of counsel, to undertake to explore these journals for the purpose of ascertaining the manner in which a law duly certified went through the legislature and into the hands of the governor. If counsel say the journal shows a law to have been passed without calling the yeas and nays, let them make the requisite proof of that fact by means of the legislative journals and introduce the proof into the record."

And again, during the same year, 1867, in *Grob v. Cushman*, 45 Ill. 124, where the question was as to the jurisdiction of the La Salle county court, in a case which was brought before the supreme court for examination upon a writ of error, this language is used: "It is insisted that the La Salle county court did not have jurisdiction of the subject matter of this cause; that the act of the legislature under which the jurisdiction is claimed never became a law in the mode prescribed by the Constitution. And counsel, in their argument, refer to the journals of the house in support of this position. On the trial below no evidence from the journals was introduced. But it is now urged that, as they are public records, the court will take judicial notice of them, and not require them to be embodied in the evidence. It is true that they are public records, but it

does not follow that they will be regarded as within the knowledge of the courts, like public laws. Like other records and public documents, they should be brought before the courts as evidence. But when offered they prove their own authenticity. Until so produced they cannot be regarded by the courts." Both these cases were decided two years before the bonds now in suit were issued.

Later, in 1871, in the case of *The People v. De Wolfe*, 62 Ill. 253, an application was made for a mandamus requiring a justice of the peace to issue an execution upon a judgment recovered before him. In his return he stated that the act under which he assumed jurisdiction when he gave the judgment had never in fact been constitutionally passed, and gave the particulars of his claim in that behalf. In delivering the opinion, the court clearly considered the question presented as one of fact, for they say: "It appears by the return, which is not traversed, and is to be taken as true," &c. . . . "Our decision is predicated solely upon the state of facts as set forth in the return in this case, without an inspection of the journals of the senate, and we pass upon the validity of the act in question no further than as affects the present application in view of the admitted facts in the case."

It is difficult to see what could be done to manifest more clearly the determination of the court to make the question whether a *prima facie* statute had been constitutionally passed one of fact to be established by "legitimate proof" when a contest arises. This may operate to give an apparent statute effect under one state of circumstances and not under another; but with that we have nothing to do. Our duty is ended when we have discovered and complied with the rule which the appropriate tribunal has established.

Under the operation of this rule the plaintiff below made out his case when he proved the execution of his bonds and put them in evidence; and in the absence of proof by the defendant he was entitled to his judgment, even though the law might not have been constitutionally passed, because it was no part of the duty of the court "to explore the journals for the purpose of ascertaining the manner in which a law duly certified went through the legislature."

The question then is whether, under the circumstances of this case, the defendant can be permitted to make the proof. This does not depend upon the construction of the Constitution, but upon the general principles of commercial law applicable to the Constitution as construed. The issue is made upon the fact of the passage of the law. *Prima facie* it was passed, and it was apparently in force. Both parties acting upon this *prima facie* case, and supposing it to be true in fact, have become bound; one has borrowed and the other lent. The lender has performed his part of the contract and delivered the money; and the simple question to be determined now is whether, under such circumstances, the borrower can refuse to pay because, upon further investigation, he has ascertained that the legislative journals do not contain the necessary evidence to establish the fact of the due enactment of the law. Reverse the case. Suppose the town had subscribed for the stock and paid the subscription, could the railroad company keep the money and refuse to issue the stock because, after the transaction, it had ascertained that a vote had not been taken by

ayes and noes in one of the houses upon the final passage of the bill? Certainly not, and the reason is obvious. Under such circumstances the law estops the party from asserting the falsehood of that which appears to be true. This court has from the beginning applied this rule to this class of cases. It was first stated in *Comm'rs of Knox Co. v. Aspinwall*, 21 How. 545, where, using the language of Ch. B. Jervis in *Royal British Bank v. Tarquand*, 6 Ellis & B. 527, it was said: "We may now take it for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here on reading the deed of settlement will find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have the right to infer the fact of a resolution authorizing that which, on the face of the document, appeared to be legitimately done." It is unnecessary to refer to the numerous cases which have come up since. While some of them have gone further than the English court did in that from which the quotation was made, none have fallen short of it. We need not go further in this. The purchasers of these bonds were bound to read the statute under which they were issued, but they were not bound to do more. Finding it upon the statute book, apparently in force, they had the right to infer that it was actually in force and govern themselves accordingly.

It must be remembered that this is not a case of construction. The question is not whether a law admitted to be in force confers the necessary power, but whether a law which does confer the power and is apparently in force can be shown not to have been in fact passed according to the requirements of the Constitution, after parties have acted upon the faith of it and changed their condition. When the question is one of construction alone, all parties stand upon an equal footing and each can judge for himself. If a mistake occurs, it is one of law and not of fact. Here it is one of fact. The bonds on which this suit is brought are *prima facie* valid, and, as between these parties, I think the law will not admit the testimony offered to show that they are void. In the absence of proof they stand. The question is one of evidence. It is not whether the law has been passed, but whether testimony can be introduced to show that it was not. I think it could not. To admit it would be to ignore a principle of commercial honor upon which we have predicated a long line of decisions. I am not prepared to do so. If the courts of Illinois had been willing to take judicial notice of the legislative journals in determining what the law of the state is, there might be some propriety in requiring the people to do so. But when the courts make the question of overcoming a *prima facie* law one of fact, I think the people may do the same thing and bring to their protection the same principles of estoppel which govern them in other cases. For these reasons I dissent from the opinion which has just been read.

I am authorized to say that Justices CLIFFORD, SWAYNE, and STRONG concur in this opinion.

SUPREME COURT OF ALABAMA.

(To appear in 53 Alabama.)

INJUNCTION AGAINST SALE UNDER EXECUTION AND TO PREVENT
CLOUDS ON TITLE.

PARKS, BREWER & CO. v. COFFEY.

The state government, as organized and existing, in all its departments in Alabama, during the late war, was its rightful *de jure* government.

Judgments and proceedings of its courts, which during that time formed a portion of that government, not violative of the Constitution and laws of the United States, or infringing upon the state Constitution, are valid and binding.

A sale of land under a *pluries* execution, issued since the war on a judgment rendered during the war, is valid, and will pass the title of the defendant in execution; and he not questioning the validity of the process, a third person cannot collaterally attack a sale under the execution, on the ground that *scire facias* was necessary to authorize execution.

When an *alias fi. fa.* issues, followed up, without the lapse of a term, by a *pluries* execution under which a sale is made, the purchaser's title is superior to the lien of a creditor who attached the land in the interval elapsing between the issue of the *alias fi. fa.* and the sale under the *pluries* execution.

APPEAL from chancery court of Jackson.

Heard before Hon. R. L. Watkins.

The facts are fully stated in the opinion in chief and the response to the application for a rehearing.

Watts & Troy, for appellant. 1. From 1865 to 1868, it was conceded by every department of the state government of Alabama that executions issued on judgments rendered during the war were valid. *Foster v. Moody*, January term, 1873.

2. The supreme court of the United States has repeatedly held that the transactions of courts and legislatures of the seceded states, in regard to domestic questions, and not violative of the Constitution and laws of the United States, are as binding and valid upon citizens of those states as if there had been no war. *Texas v. White*, 7 Wallace, 700. On principle it is difficult to see how it could be otherwise. The authority of no respectable publicists can be found to the contrary.

3. A sale under the execution of appellee would create a cloud on appellant's title which equity will prevent by an injunction. *Martin v. Hewitt*, 44 Ala. 459; *Peebles v. Mobile & Girard Railroad Co.* 47 Ala. 317.

4. The lien of execution attaching before the creditor's lien arose, and being kept up until the sale, confers rights superior to those of the attaching creditor, accruing in the interval.

John D. Brandon, contra. Execution issued on a judgment rendered during the war created no lien. *Shaw v. Lindsay*, 46 Ala. 290. Such a judgment does not stand on any higher ground than a foreign judgment. *Martin v. Hewitt*, 44 Ala. 459. It can be enforced only by the law of comity, and except as evidence such a judgment cannot operate beyond

the limits of the country in whose courts it was rendered. Story Conflict of Laws, § 609.

2. No execution can issue on such judgment, until after a second suit and judgment in the *forum* in which it is sought to be enforced. *Dimick v. Brooks*, 21 Vermont, 569; 44 Ala. 419.

3. None of the cases heretofore decided in this court militate against these views. No lien having been created by the executions under which appellants claim, and appellee's rights having accrued before a sale to them, he has a perfect right to sell, and the court below properly denied the relief prayed by the appellants. None of the decisions of the supreme court of the United States have gone so far as to hold that a different effect will be given to *war judgments* than that accorded by the government within whose jurisdiction they are sought to be enforced.

MANNING, J. Appellants are in possession of, and purchased the land which is the cause of this suit, in December, 1866, at a sheriff's sale under a *pluries* writ of execution upon a judgment of the circuit court of Jackson County, rendered in 1861, during the late war, against Wallace and Chitty. The land belonged to defendant Chitty. A writ of execution, on which the costs and interests were made, was issued on this judgment in 1862; another was issued June 28th, 1866; and next in order to this, without the lapse of a term, was the *pluries* writ, under which the sale was made.

Appellants claimed the land under another title also. In March, 1866, it was attached by the sheriff of Jackson County by virtue of a writ of attachment in a suit of Falls & Cunningham against Wallace & Chitty, in which judgment was rendered, in 1867, in favor of plaintiffs. And appellants show a sheriff's deed to them, as purchasers of the same land under this judgment also.

The appellee, who was defendant below, had caused this same land to be attached in September, 1866, under a writ of attachment in a suit of his own against said Chitty, and having afterwards obtained a judgment therein, he was pressing a sale of the land under an execution upon that judgment.

The bill in this cause was filed by appellants for an injunction against this proceeding, and to remove the cloud it cast upon their title. And as under the decisions of this court, after the reconstruction of it in 1868, judgments rendered during the war were held incapable of sustaining executions on them, and of creating liens upon property after the war, the struggle of the parties to this cause was, on the part of appellee, to assail the title of appellants under the second judgment, rendered after the war, and on the part of appellants, to maintain that title. It is not necessary, however, to review the evidence relating to this contest (which occupies a large part of the record), if, under the later decisions of this court, and in our opinion, judgments rendered during the war are not for that reason invalid.

For the appellee, it is insisted that, according to the decisions of our immediate predecessors, judgments rendered in the courts of Alabama during the war are to be considered as having no higher authority than the judgments of foreign courts; of which, as such, execution could not be had in our courts. Such decisions were made, but they were after-

wards modified by the same, or some of the same judges who made or concurred in them.

The times, indeed, were not then favorable to the formation of correct opinions. Everything was disestablished. The Confederate government with all its departments, offices, and great powers, had gone down before men's eyes, and was seen no more. The state governments were prostrated, and military administrations were set up in their stead. To these succeeded civil governments that had been solemnly instituted by delegates from the people assembled in conventions. These, also, were overturned and denounced as illegal, by the acts of Congress known as "the reconstruction laws," and others were constituted to take their places.

We are referring to events, not criticising them. It does not come within the scope of our duties on this bench to pass judgment on the conduct or policy of any of the actors in those tragic scenes. But there was a general instability of the most inviolable institutions of society. And in the conflict of passions and interests producing it, principles became indistinct, and the minds of men possessed by lawless and revolutionary ideas.

That a much greater amount of evil than that which we have hitherto suffered did not result from this condition of things, is largely due to the moderation, wisdom, and learning of the supreme court of the United States. The influence of its action has been felt in all the courts of the land. And it is by the light which that tribunal has shed upon the subject, that we propose to proceed in our investigations of the questions: What authority is due to the judgments and decrees of the courts of Alabama rendered during the war? and What was the *status* of those courts?

In 1867, the case of *Walker v. Villavaso*, 6 Wall. 124, came before that court. The facts concerning it were these: In 1861, Louisiana had (according to the report of the case) "passed an ordinance of secession from the Union, adopted the Constitution of the rebel states, required all office holders to swear allegiance to it, and had been proclaimed in a state of insurrection by the President of the United States." After this, in October, 1861, a decree for the foreclosure of a mortgage, and sale of the mortgaged property, was made by a district court of that state. In 1867, after the war was over, this decree was affirmed by the supreme court of Louisiana, then reconstituted and a loyal court. In the supreme court at Washington it was insisted that it must take judicial cognizance of the facts mentioned, which (as it was urged) made the decree of the district court void, as that of an insurrectionary court under a political organization hostile to the United States, and so must judicially know that the appellate court of Louisiana, in affirming that decree, decided adversely to the proposition, that it was void for that reason; wherefore the supreme court of the United States should take jurisdiction of the cause. But it held in a brief opinion, that this matter not appearing by the record to have been in controversy below, the cause could not be brought before it under the Judiciary Act of 1789, and it was, therefore, dismissed. This left the original decree below (rendered when Louisiana, as one of the Confederate States, was waging war against the federal government) to be carried into effect, upon the recognition and affirmation of it as valid, after the war, by the supreme court of Louisiana.

At the same term (December, 1867) of the supreme court, at Washington, the question came up in a different form, in *White v. Cannon*, 5 Wall. 448. This also was from the supreme court of Louisiana. But this time it was that court, and not the inferior one, that was the "rebel court." And it had, after the ordinance of secession of Louisiana had been passed, reversed the judgment of an inferior loyal court, and rendered a different one in its stead. Upon the argument of it at Washington, it was suggested to the court that the decree of the appellate court below was void, because rendered after the secession of Louisiana from the Union. But the supreme court of the United States, after reviewing the case, affirmed the decree, and briefly said in conclusion: "The objection that the decree of the supreme court of Louisiana is to be treated as void, because rendered some days after the passage of the ordinance of secession of that state, is not tenable. That ordinance was an absolute nullity, and of itself alone, neither affected the jurisdiction of that court, or its relation to the appellate power of this court."

At the next term came up the great case of *Texas v. White*, to which we shall recur hereafter.

In June, 1871, in the circuit court of the United States, at Mobile, Mr. Justice Bradley of the supreme court presiding, the case of *Lockhart et al. v. Horn, Ex'r, et al.*, came up for consideration. This was a suit on the equity side of the court, to set aside a will which had been established in a probate court of Alabama, and for the settlement of an administration.

In his opinion in the cause, Justice Bradley said: "The complainant relies on several grounds for the suspension of the limitation: first, the fact that civil war was raging in Alabama and other states, from January 11, 1861, when the act of secession was adopted, to the close of hostilities and restoration of order, in the summer or fall of 1865. I do not agree that this was a sufficient ground for the suspension of legal remedies and acts of limitation, as between the citizens of Confederate States, any more than it would be as between citizens of states which adhered to the general government. It is a fact, that the courts of Alabama were open to all the citizens of the Confederate States, and there was no law to prohibit them from resorting thereto. . . . Unless a country is actually occupied by hostile forces, and its laws and courts are suppressed, it would be giving to the courts too large a discretion, to allow them to decide when and when not the statutes of limitation are in operation, as between their own citizens."

Having, after reviewing all the grounds, decided that complainants were not excusable for not having brought suit during the war in the courts of Alabama, and were therefore barred of a part of the relief they claimed, the learned justice had next to meet the question of the liability of the executor for funds of the estate which, in 1864, he had invested in bonds of the Confederate States. In reference to this, he says: "As a general rule, in my judgment, all transactions, judgments, and decrees which took place in conformity with existing laws, in the Confederate States, between the citizens thereof, during the late war, except such as were directly in aid of the rebellion, ought to stand good. The exception of such transactions as were directly in aid of the rebellion is a political necessity, required

by the dignity of the United States government, and by every principle of fidelity to the Constitution and laws of our common country."

Having decided that the investment in Confederate bonds was directly in aid of the rebellion, and that therefore the executor could have no benefit from that act, the final question was, whether the executor should be liable for the funds he had so invested as good money, or for their value at the time, as Confederate treasury notes, he having received them in payment as the currency then in use. It appeared that the executor took office in March, 1858; that the debts from which those funds arose were due before the war began; and that he was urged and cited to settle the estate in August, 1860, and again in January, 1861; and "he has not shown" (says Justice Bradley) "sufficient excuse for not collecting the funds of the estate before the war commenced. Had he shown such excuse, I should have felt bound to charge him only with the value of the funds at the time when he received them, with a reasonable allowance of time for making a settlement."

"It may be urged" (continued the learned justice) "that the decree of the probate court, made in May, 1864, is conclusive on the question of the executor's diligence. . . . But a careful examination of that decree shows that this question was not passed upon by the court. . . . *Had the court decided the question of diligence, I should have deemed its decision on that point conclusive.*"

These large extracts are made, because this opinion of Judge Bradley is believed to be not yet published in any book of reports, and because of its great value in showing how fully and emphatically the eminent judges of the highest court in the land acknowledge the validity and authority (when not in conflict with the federal Constitution) of the laws, judicial proceedings, and governmental institutions of the states of the late Southern Confederacy.

In affirming the decree of Justice Bradley, in this case, the supreme court of the United States said: "We admit that the acts of the several states, in their individual capacities, and of their departments of government, executive, judicial, and legislative, during the war, so far as they did not impair or tend to impair the supremacy of the national authority, or the just rights of citizens under the Constitution, are in general to be treated as valid and binding. The existence of a state of insurrection and war did not loosen the bonds of society, or do away with civil government, or the regular administration of the laws. Order was to be preserved, police regulations maintained, crime prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of property regulated, precisely as in time of peace. No one, that we are aware of, seriously questions the validity of judicial or legislative acts in the insurrectionary states, touching these and kindred subjects, where they were not hostile in their purpose or mode of enforcement to the authority of the national government, and did not impair the rights of citizens under the Constitution." *Horn v. Lockhart et al.* 17 Wall. 580. In harmony with these declarations of the law is the opinion in *Texas v. White*, 7 Wall. 700, as explained in *Huntington v. Texas*, 16 Wall. 402. Quotations to this point, from these cases, are needless, and would too much extend this opinion.

But while the validity and authority of the acts, judgments, and decrees of the several departments of the state governments, during the war, are so fully and emphatically affirmed, it is nowhere expressly held that those governments were, during that period, the rightful, legitimate governments of these states. On the contrary, in *Texas v. White, supra*, the chief justice, *arguendo*, says: "The Legislature of Texas, at the time of the repeal, constituted one of the departments of a government established in hostility to the Constitution of the United States. It cannot be regarded, therefore, in the courts of the United States, as a lawful legislature, or its acts as lawful acts. And yet it is an historical fact that the government of Texas, then in full control of the state, was its only actual government; and certainly if Texas had been a separate state, and not one of the United States, the new government having displayed the regular authority, and established itself in the customary seats of power, and in the exercise of the ordinary functions of administration, would have constituted, in the strictest sense of the words, a *de facto* government, and its acts, during its existence as such, would be effectual, and, in almost all respects, valid. And to some extent, this is true of the actual government of Texas, though unlawful and revolutionary as to the United States."

The chief justice then goes on, without intending (as he says) to be full and exact, to speak of the acts of such a government which must be treated as valid, and concludes by saying: "That acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void:" which, accompanied by the explanations made in *Huntington v. Texas, supra*, corresponds with what we have before quoted from *Horn v. Lockhart*, 17 Wall. 580.

Of the paragraph above, from the opinion in *Texas v. White*, without adverting particularly to its defective logic, two things are to be noted: First, the learned chief justice had previously mentioned that the governor and secretary of state of Texas, having refused to take an oath of allegiance to the Confederate States, "were summarily ejected from office:" and since he speaks in the passage of "the *new* government having displaced the regular authority," &c., we must infer that he had in mind this government, referred to as established by actual usurpation, when he was speaking of its *status* and authority; and secondly, all those acts which he says "must be regarded as invalid and void," if done by the "actual government of Texas, though unlawful and revolutionary as to the United States," would have been equally "invalid and void," if done by the lawful and regular government, before secession from the United States.

Hence, no support is afforded by that opinion to the proposition, that the government of Alabama (which was not established by the expulsion of any person from office, and the introduction of a usurper in his place) *was not* the government *de jure* of this state during the war. Other portions of that opinion enable us to demonstrate that it was.

"We have already" (says the chief justice) "had occasion to remark, at this term, that 'the people of each state compose a state, having its own government and endowed with all the functions essential to separate and independent existence,' and that 'without the states in union, there

could be no such political body as the United States." *County of Lane v. The State of Oregon*, 7 Wall. 76. Not only, therefore, can there be no loss of separate and independent autonomy to the states, through their union under the Constitution, "but it may be not unreasonably said that the preservation of the states, and the maintenance of their governments, are as much within the design and care of the Constitution, as the preservation of the Union and the maintenance of the national government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states."

Uttered at a time of stormy excitement, when the obligations and restraints of the Constitution were little heeded, these are noble sentences. Before the war, then, and while in the Union, Alabama was endowed with autonomy. Her people composed "a state having its own government, and endowed with all the functions essential to a separate and independent existence." The persons who exercised this government were elected into it by this people. They were not appointees of any officials of the United States. Their tenure of office did not depend upon any federal functionary. They could not be deposed, or their places supplied, by the action of any one from without the state. In fine, they composed a government, created by the people of Alabama, for the enactment and enforcement of the laws of this people, were responsible for their official acts only to this people, could be succeeded in office only by those whom this people should elect, and possessed, rightfully, *de jure*, all the powers of government, except those which were denied to them by the Constitution of Alabama and the Constitution of the United States.

The rightful government, thus constituted and thus endowed with the powers and faculties of administration, which Alabama had before and when the act of secession was passed, continued without change, except by the regular election or appointment of successors to the persons whose terms of office expired, down to the close of the war. If any of its members ceased to be lawful members of the government, while they acted as such, and became merely *de facto* members of it, or only *actual* members, they were then usurpers of seats of authority which belonged to others. Who were those others that were thus expelled, or kept out? Who claimed to be so? Who, if the incumbents had vacated their offices, would have had the right, or claimed that they had the right, to take and occupy them?

These are questions that cannot be answered; and why not? Because the incumbents of those offices were not usurpers of them, but rightfully in possession.

Is there some dim idea, however, existing, that although this be true of the persons exercising authority, yet the state government itself, with its departments and offices, had become defunct? How could this happen?

Whether in the Union or out of it, Alabama did not cease to be a state. Some of her elder sisters were states with their separate and independent governments, before the Union under the Constitution was formed; and any or all of them might continue to be so, if the Union were utterly dissolved. To the political community denominated a state, the organization which we call government is essential; it is of the substance of it, and a part of the idea which the word expresses. And such an organization

was certainly quite as necessary to Alabama, while dissevered from her co-states, as while in union with them. This is indeed affirmed, or recognized, in most of the passages which we have quoted from cases in the federal courts. The latest of those in the supreme court, at Washington, relating to this matter, is that of *Sprott v. United States*, decided at the present term. [See report in the January No. 1875, of *The American Law Register*.] Miller, J., in delivering the opinion of the court, and speaking of the difference between "the so-called Confederate government and that of the states," says: "The latter, in most, if not in all instances, merely transferred the existing state organizations to the support of a new and different national head. The same constitutions, the same laws for the protection of property and personal rights, remained and were administered by the same officers. These laws, necessary in their recognition and administration to the existence of organized society, were the same, with slight exceptions, whether the authorities of the state acknowledged allegiance to the true or the false federal power. They were the fundamental principles for which civil society is organized into government, in all countries, and must be respected in their administration under whatever temporary dominant authority they may be exercised."

Anything more conclusive on this point, it would be both difficult and needless to produce. But we may add, that it having been repeatedly held by the highest court of this country, that the acts and ordinances of secession were mere nullities, absolutely void, and all the efforts made in support of them having proved ineffectual, it follows that legally, in contemplation of law, Alabama was never out of the Union. The Constitution and laws of the United States, though their operation was suspended, continued obligatory within her borders, during the whole period of the war. And she continued to be a member of what the Constitution in all its provisions designed to be "an indestructible Union, composed of indestructible states."

Of course, we are not to be understood as holding that because the courts and legislatures of Alabama during the war were such rightfully, — *de jure*, — therefore whatever they did must be lawful. Admit, for the sake of the argument, that the persons exercising public functions employed them in doing many illegal acts, even treasonable ones. What then? Concede that they became liable to be, and were, pursued, driven from office, and punished, by the federal government; and that their official acts of the character supposed must be treated as null and void. All this would not prevent the things which they had officially done that were not in violation of superior laws, or of the rights and obligations arising under such laws, from being valid and effectual, any more than the crimes of Charles I. and his decapitation for them, or those of James II., for which England dethroned and expelled him, invalidated the acts which they had lawfully done while they yet actually swayed the sceptre, as kings *de jure* of the realm.

Our conclusion then is, that the courts of Alabama, during the war, were a portion of the rightful government of the state; and that their judgments, decrees, and proceedings, not in violation of the Constitution and laws of the United States, or of any right or obligation arising under them, and not in violation of the Constitution of Alabama, are valid, and must have operation and effect accordingly.

We have before mentioned that the views of our predecessors on this point, as expressed in *Hall v. Hall*, 43 Ala. 488; *Powell v. Boon*, Ib. 459; *Martin v. Hewitt*, 44 Ala. 418, and in other cases, have been modified by later decisions. We refer to the cases of *Tarver v. Tankersley*, *Powell v. Young*, and *Riddle v. Hill*, decided at the last (June) term of this court, and the opinions therein delivered by Brickell, J.

In them it was held, conformably with the opinion of the supreme court of the United States in *Horn v. Lockhart*, *supra*, that "judicial proceedings in this state during the war, so far as they did not impair, or tend to impair, the supremacy of the national authority, or the just rights of citizens under the Constitution, are to be treated as binding."

This rectification of the judicial opinion of the court gave great satisfaction to the lawyers and people of the state. Its tendency was to prevent litigation from being fomented, and the peace of families from being disturbed. We have gone a step further (we hope with like beneficent consequences), in holding that the courts in which those judicial proceedings were had were a part of the rightful government of the state.

One consequence of this decision is, that no act of the legislature, or ordinance of a convention, is necessary to give validity to the judgments, decrees, and proceedings of those courts.

Another consequence is, that the records and papers of those courts, during the war, are to be preserved with the same care, and certified in the same manner, as those of the courts held since; and like punishments are to be inflicted for the destruction, mutilation, abstraction, or falsification of the records and papers of the one as of the other.

According to our views, the title to the land in controversy, acquired by appellants under a judgment rendered during the war, the executions upon which created a lien commencing at an earlier date than that created by the attachment for appellee, is valid. And the proceedings of the appellee to have the land sold under the judgment in his suit are injurious to appellants, and cast a cloud upon their title.

The decree of the chancellor is reversed, and a decree will be here rendered perpetually enjoining appellee from further proceeding to sell the land in controversy to satisfy his judgment.

Appellee will pay the costs of this suit in this court and in the court below.

BRICKELL, C. J., not sitting.

At a subsequent day of the term, appellee applied for a rehearing. The argument in support of it did not come into the reporter's hands. The following response was made thereto:—

MANNING, J. Application is made for a rehearing in this cause, upon a supposed misapprehension by the court of the facts disclosed by the record. And in support of the application it is alleged that it was not averred by the appellants in their bill, or proved, that executions were regularly issued upon the judgment under which the land in controversy was purchased by them, without the lapse of the term.

The judgment in the suit of W. H. Webb & Co. against J. E. Wallace and Dixon Chitty, which is one of those under which appellants purchased the land, was rendered on the 10th day of October, A. D. 1861.

Execution was issued on it in December, 1862, upon which the sheriff returned that he had "received interest and costs on the within *fi. fa.* April 1st, 1863." An *alias fi. fa.* was issued and delivered to the sheriff June 28, 1866, but not returned by him, and a *pluries fi. fa.* was issued and delivered to the same sheriff October 24, 1866, under which he sold the land, and it was bought by appellants on the first Monday in December, 1866, after having been duly advertised. All this appears by the transcript of the record of the cause, which is made an exhibit to the bill of complaint, as a part of it, and was also put in evidence.

The regularity of the proceedings upon the judgment of Webb & Co. against Wallace and Chitty was never disputed or objected to by either of the latter, and it was the land of one of them (Chitty) which was sold, under the execution, to appellants. If the execution ought not to have been issued without a *scire facias* to revive the judgment, advantage should have been taken of this by the parties, in a direct proceeding. The regularity of the process and proceeding cannot be collaterally assailed by a third person.

Speaking of an authority referred to, in *Stewart v. Nichols*, 15 Ala. 230, Collier, C. J., said: "The court seemed to assimilate the case before it to a *fi. fa.* sued out after a year and a day after the rendition of the judgment, which is confessedly not void, but merely voidable by some direct proceeding." And again he said (p. 231): "In such case the judges held that if the execution issued without a *scire facias* after a year and a day, and the defendant did not interpose to set it aside, it was an implied admission that the judgment was unsatisfied and existed in full force." This removed the presumption of payment, arising from the plaintiffs' not taking out execution within a year and a day. See, also, to same effect, *Sellers & Cook v. Hayes*, 17 Ala. 753; *Pollard v. Cocke*, 19 Ala. 188.

The execution issued upon the judgment of W. H. Webb & Co. v. Wallace and Chitty, on the 28th of June, 1866, preceded by nearly three months the attachment of the land in September, 1866, by appellee, and being followed, without the lapse of a term, by the execution of October, gave to plaintiffs in it priority over the attachment. And it was under this latter execution appellants purchased the land.

It is not, therefore, necessary to examine the voluminous evidence relating to appellants' purchase of the same land under the judgment rendered in the case of *Falls & Cunningham v. Wallace & Chitty*, commenced by attachment other than that of appellee.

The application for rehearing is denied.

BRICKELL, C. J., not sitting.

SUPREME COURT OF MARYLAND.

(To appear in 44 Md.)

NATIONAL BANK. — BAILMENT. — POWER OF NATIONAL BANK TO RECEIVE COLLATERAL SECURITY. — LIABILITY OF NATIONAL BANK FOR THE LOSS OF BONDS DEPOSITED FOR SUCH PURPOSE. — DEGREE OF CARE OF BANK. — DAMAGES. — PROVINCE OF JURY.

THIRD NATIONAL BANK OF BALTIMORE v. BOYD.

The Third National Bank of Baltimore was organized under the National Currency Act of 1864, ch. 106. The firm of W. A. B. & Co., of which W. A. B. was the senior member, was a large customer of the bank through which all the banking business of the firm was transacted, and from which it received accommodations as needed. On the 5th of February, 1866, the firm was indebted to the bank about \$5,000, and W. A. B. voluntarily proposed to the president of the bank to deposit with the bank about \$37,000 in bonds, as collateral security for his present and future indebtedness. Subsequently, as agreed between W. A. B. and the president of the bank, certain bonds and stocks were deposited as collateral security for the payment of all obligations of W. A. B. and W. A. B. & Co. to the bank, then existing, or that might be incurred thereafter, with the understanding that the right to sell such collaterals, in satisfaction of such obligations, was vested in the officers of the bank. Some of the bonds were subsequently withdrawn and others deposited in their place. While these collaterals remained in the bank, the firm kept a deposit account with the bank, having an average amount of about \$4,000 on deposit, and from time to time as it needed, obtained discounts ranging from \$2,000 to \$15,000, on the security of the collaterals; it sometimes owed the bank nothing, but left the bonds in its vault; at times when the firm wanted money for a very short time, it obtained it from the bank, on the security of these collaterals, on what were called "call loans," by checks. The officers of the bank considered the account of the firm a very desirable one, and the arrangement, by which every liability of theirs was secured by the collaterals, very advantageous to the bank. The firm was not indebted to the bank subsequent to July, 1872, when it paid its last indebtedness; the bonds were not withdrawn, but left in the bank under the original agreement. Between Saturday evening, the 17th, and Monday morning, the 19th of August, 1872, the bank was entered by burglars and certain of the bonds were stolen. By section 8 of the Act of Congress of 1864, ch. 106, a bank organized thereunder is authorized "to exercise all such incidental powers as shall be necessary to carry on the business of banking, by discounting promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits, by buying and selling exchange, coin, and bullion; by loaning money on personal security, and by obtaining, issuing, and circulating notes according to the provisions of this act." In an action by W. A. B. against the bank, to recover the value of the bonds which were stolen, it was *Held*:

- 1st. That the contract entered into by the bank was not a mere gratuitous bailment.
- 2d. That the bank had the power to enter into the contract, it being within the terms of the act of Congress.
- 3d. That the original contract of bailment being valid and binding, the obligation of the bank for the safe custody of the deposit did not cease when the plaintiff's debt had been paid.
- 4th. That the defendant was responsible if the bonds were stolen in consequence of its failure to exercise such care and diligence in their custody or keeping, as at the time banks of common prudence, in like situation and business, usually bestowed in the custody and keeping of similar property belonging to themselves; that the care and diligence ought to have been such as was properly adapted to the preservation and protection of the property, and should have been proportioned to the consequence likely to arise from any improvidence on the part of the defendant.

5th. That the proper measure of damages was the market value of the bonds at the time they were stolen.

Whether due care and diligence have been exercised by a bank in the custody of bonds deposited with it as collateral security, is a question of fact exclusively within the province of the jury to decide.

APPEAL from the circuit court for Howard County.

On the morning of Monday, the 19th of August, 1872, when the officers of the Third National Bank of Baltimore arrived at the bank, it was discovered that since the close of business on Saturday evening, the vault and safe of the bank had been broken into by burglars, and robbed of a large amount of money and valuable securities. The entrance had been effected through the walls of an adjoining building, belonging to Mr. John S. Gittings, by tenants of that building, who had rented it doubtless for the express purpose of carrying out the scheme of plunder. By appropriate and ingenious tools, the walls of both buildings, and of the vault, and the iron plates between the double walls of the vault had been perforated, and the safe within forced open. Among the valuables taken were some \$64,000 in money belonging to the bank; \$10,000 in the custody of the paying teller; \$40,000 of coupon bonds belonging to the family of the acting president of the bank and in his custody; and various coupon bonds belonging to the appellee, the market value of which at that time was nearly \$26,000. To recover the value of these last mentioned bonds the present suit was instituted by the appellee against the appellant in the superior court of Baltimore city, whence it was removed, on the suggestion and affidavit of the latter, to the circuit court for Howard County, where it was tried. There was much testimony in relation to the circumstances attending the proceedings of the burglars, and in regard to the precaution taken by the appellant, and by other banks in the city of Baltimore, to guard the money and other valuables in their custody. On one side, the object was to show that everything was done that could be reasonably required on the part of the defendant for the safe-keeping of the bonds in its vault; on the other, that there was such remissness in various respects as rendered the defendant liable to the owners of special deposits.

At the close of the testimony, the plaintiff offered seven prayers, of which the court granted the first, fourth, fifth, sixth, and seventh, and rejected the second and third. The first and seventh prayers are sufficiently set out in the opinion of this court; the fourth, fifth, and sixth are as follows:—

4. That if the jury shall find that the bonds of the plaintiff were in the custody of the defendant under the agreement, and for the purposes set forth in the plaintiff's first prayer, and that the robbery and loss of the bonds thereby which have been given in evidence might have been prevented by ordinary vigilance and care on the part of the watchmen of the bank, or either of them, then the loss of the plaintiff's bonds by said robbery is no defence to the plaintiff's claim in this action.

5. If the jury find that the bonds of the plaintiff being in the custody of the defendant under the agreement, and for the purpose set forth in the plaintiff's first prayer, were lost or stolen by reason of any neglect or of inattention to duty on the part of any of the officers or employees of

the bank, which the jury shall find to amount to want of ordinary vigilance and care, the defendant is responsible therefor.

6. That the degree of care which the defendant was bound by law to take of the bonds of the plaintiff in its custody under the agreement set forth in the plaintiff's first prayer, is not to be determined by the care which the defendant may have seen fit to take of similar property of its own at the same time. And the fact that the defendant lost a large amount of its own moneys and securities at the same time, and in the same way, with the bonds of the plaintiff, is therefore not in itself sufficient to exempt the defendant from liability to the plaintiff in this action, unless the jury shall find that the care which the defendant took of its own property was reasonable care.

The defendant offered eleven prayers, of which all but the tenth were either granted by the court or conceded by the plaintiff's counsel. The tenth, which the court rejected, is contained in the opinion of this court. The defendant excepted. The verdict and judgment were for the plaintiff, and the defendant appealed.

The cause was argued before Bartol, C. J., Stewart, Bowie, and Alvey, JJ.

Henry Stockbridge & Thomas Donaldson, for the appellant. The memorandum of the 5th of February, 1866, could not be construed as a contract made by the bank, as neither the discount clerk, nor the president who dictated its terms, had any power to make such contract for the bank, and it does not appear that such contract was ever authorized by the board of directors or desired by them, or even known to them; and though such deposit, and subsequent deposits of the same nature, by the plaintiff, were known to the cashier, yet neither had he any authority to enter into such an undertaking for the corporation. Such powers are not vested in any of the officers named, and only the action of the board of directors, or the acquiescence of the board after knowledge of what had been done, could impose such a responsibility upon the bank. 13 Stat. at Large, 101; Rev. Stat. U. S. 998, 999; *Morse on Banking*, 128, 129, 133, 138; *Wiley v. First National Bank of Brattleboro'*, 47 Vermont, 546; *Foster v. Essex Bank*, 17 Mass. 497; *Lloyd v. West Branch Bank*, 15 Pa. 172; *Scott v. National Bank of Chester Valley*, 72 Ib. 471; *United States v. City Bank of Columbus*, 21 How. 356.

National banks, under the terms of the act of Congress, have no power to receive special deposits, either gratuitously or for hire; and if they were responsible for the plaintiff's bonds, while they were held as collateral security for indebtedness, that responsibility ceased with the indebtedness, — or certainly after the plaintiff had had a reasonable time to withdraw them; and no notice from the defendant, requiring such withdrawal, was necessary. *Wiley v. First National Bank of Brattleboro'*, *supra*; *First National Bank of Lyons v. Ocean National Bank*, 60 N. Y. 278; *Foster v. Essex Bank*, 17 Mass. 497; 1 Sm. L. C. 388.

Even if the general principles laid down by the court below in regard to the responsibility of the defendant in this case are correct, yet there was error in granting the plaintiff's first prayer; because a few points in the evidence are selected, and the jury are instructed that they may take those points into consideration, in forming a judgment on the question of

whether there was exercise of the proper degree of care on the part of the defendant, in the custody of the plaintiff's special deposit. As there was a large body of evidence produced on both sides, bearing on this very question, and as all such evidence should have been fully considered by the jury, and due weight given to every part of it; and as the jury was the sole tribunal entitled to decide the relative importance of the various items of such evidence, — the terms of this instruction were not only misleading, but, in this respect, were a direct invasion by the court of the province of the jury. *Hurt v. Woodland*, 24 Md. 417; *B. & O. R. R. Co. v. Boteler*, 88 Ib. 568.

The measure of damages fixed in the instruction is error, the true rule being the value of the property at the time when it was demanded. *Maurry & Osbourn v. Coyle*, 84 Md. 235.

John H. Thomas & S. Teackle Wallis, contra. Corporations are, on general principles, vested with all incidental powers which are necessary for the purposes of their organization, and which are not prohibited by their charter. *Plank Road Co. v. Young*, 12 Md. 477-84; *The Penn., Del. & Md. Nav. Co. v. Dandridge*, 8 Gill & John. 818-19; Angell & Ames on Corporations, pages 218-232, ch. 8, secs. 2 and 12, ed. of 1846. Taking of special deposits is part of the ordinary business of banking. *Marine Bank v. Fulton Bank*, 2 Wall. 255, 256.

Power to make such contracts as that on which the appellant was sued in this case, was expressly conferred on national banks by the act of Congress under which the appellant was organized. Act of Congress 8d June, 1864; 13 Stat. at Large, Brightly's Supplement, page 58.

The 8th section of this act empowers them to "exercise under this act all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits, by buying and selling exchange, coin, and bullion; by *loaning money on personal security*," &c. Personal security here, means the security of personal property. All of the other transactions previously mentioned are on the security of persons. These words were added for the purpose of making it clear that national banks were to have the right to take *personal property* as security, and by taking it, if accompanied, as in this case, with possession, to assume liability for its proper custody.

They are not prohibited from so taking it as security for either contemporaneous or future transactions. If the act had intended so to limit their power, it would have done so in express language, as it did in reference to mortgages on real property. See sec. 28.

A pledge may be given as well for a future and contingent debt, as for an existing one. Story on Bailments, sec. 300; *Conard v. Atlantic Ins. Co.* 1 Peters, 448.

A bank is responsible for negligence in the discharge of its undertaking to collect a draft without any special consideration for the assumption of that duty. If such an undertaking be a legitimate element of banking business, the taking of collaterals for its own security must be equally so, and equally within the power of national as well as state banks. *Chicopee Bank v. Philadelphia Bank*, 8 Wall. 641.

The contract was one which either party to it could terminate at pleas-

ure, subject to such rights as had already accrued under it. The appellant had as much right to deliver the collaterals as the appellee had to demand them. So long as neither of them exercised that right, they were held under the original contract. The appellant recognized the distinction between them and similar property held by it as a gratuitous bailee. It required all of its customers to remove boxes and valuables which they had left with it for their own accommodation and security merely, but retained the property in question, as collaterals, under the original agreement, and so held them at the time they were stolen. Either party to a tenancy at will may terminate it. But until it is terminated, both of them remain liable to all of its obligations. So did both parties to this contract, so long as they permitted it to remain in force, as it was when the collaterals were stolen. Under such circumstances, the liability of the appellant, to the full extent defined by the instructions of the court, seems clear. *Erie Bank v. Smith, Randolph & Co.* 3 Brewster, 9.

National banks are liable for the loss of property held by them, merely for the accommodation of their customers, without any consideration for the keeping of it, except the profit derived from their customers doing with them their banking business. But the court below did not consider it necessary to decide, and did not decide that point. It is not involved in this appeal. *White v. Bank*, 4 Brewster, 234; *Pattison v. Syracuse Nat. Bank*, 4 N. Y. S. Ct. Rep. 96; *Skull v. Kensington Bank*, Leg. Int. March 25, 1873; *First Nat. Bank of Iowa v. The Ocean Bank*, Court of Common Pleas of New York, 23d March, 1873; *Smith v. First Nat. Bank in Westfield*, 99 Mass. 605-11; *Scott v. National Bank of Chester Valley*, 72 Penn. 471.

The particular circumstances which the jury were told by the plaintiff's first prayer they *might*, not *must*, consider, were all proper for their consideration. That prayer is not liable to the objection that it gave to these circumstances undue prominence. Where a question of negligence or of care is one of mixed law and fact, there is no other way in which a jury can be properly instructed on what their verdict ought to depend than by directing their attention to the particular facts into which they should inquire. *B. & O. R. R. Co. v. Schumacher*, 29 Md. 168, 174-5; *Maury & Osbourn v. Coyle*, 34 Ib. 237; *Erie Bank v. Smith, Randolph & Co.* 3 Brewster, 9; Story on Bailments, secs. 11, 12, 15, 17, 136, 332; *B. & O. R. R. Co. v. Worthington*, 21 Md. 275, 282-4; *Cumb. & Penn. R. R. Co. v. State*, 37 Ib. 126; *Cumb. v. Camden & Amboy R. R. Co.* 2 Daly, 454; *Ewalt & Myers v. Harding & Hopkins*, 16 Md. 170.

The right of a party in any case to segregate facts, and to ask proper instructions in reference to them is well established. *Williams v. Woods, Bridges & Co.* 16 Md. 220; *Birney v. N. Y. & Wash. Telegraph Co.* 13 Ib. 341; *Parkhurst v. N. Central R. R. Co.* 19 Md. 472. See also 17 Wall. 382, 383.

Even if the *degree* of care ought to have been defined in such legal language, the court *did* so define it, at the instance of the appellant, and *did* instruct the jury that the plaintiff was not entitled to recover if the defendant had used *ordinary care*.

The plaintiff's first prayer properly rested his right to recover "on the failure on the part of the defendant to exercise such care and diligence in

the custody or keeping of them (the collaterals), as, at the time they were stolen, banks of common prudence, in like situation and business, usually bestow in the custody or keeping of similar property belonging to themselves;" and his seventh instructed the jury, that it was their province to determine, from all the facts and circumstances of the case, whether that amount of care had been used or not. *B. & O. R. R. Co. v. Fitzpatrick*, 35 Md. 22, 44.

It was no defence to the appellant that it had lost its own property, if it had not taken of it the necessary amount of care, and therefore the plaintiff's sixth prayer, in connection with the defendant's ninth prayer, was properly granted. *Doorman v. Jenkins*, 2 Ad. & El. 258 (29 E. C. L. 82); *Tracy v. Wood*, 3 Mason, 132; 2 Smith's Leading Cases, 340; *Story on Bailments*, secs. 64-7; *Erie Bank v. Smith, Randolph & Co.* 3 Brewster, 9.

In this case there are two counts in trover and two in case: one for violation of the duty imposed by law to deliver the bonds when demanded, if no indebtedness existed, for which they had been pledged; the other of the duty to keep them with such care that they should not be lost through the default of the defendant. The evidence was that the bonds had been stolen in the interval between Saturday afternoon, the 17th, and Monday morning, the 19th of August, 1872. The conversion, if the counts in trover were relied on, consisted not in the refusal to deliver them after they had been stolen, for then it was impossible—but in permitting them to be stolen.

If the counts in case were relied on, the obligation to keep the bonds so that they should not be lost by the fault of the defendant was broken by permitting them to be lost or stolen. The time of the loss of the bonds, under either count, was that at which the wrong to the plaintiff was done, and that at which the value of the property should be estimated. After the conversion was committed, or the liability in case had accrued, no demand to perfect the plaintiff's right was necessary, and his delay in making a demand which could not be complied with did not have the effect of postponing the period at which the value of the property should be taken as a standard of damages. *Baltimore Marine Ins. Co. v. Dalrymple*, 25 Md. 304-5; *Williams v. Woods, Bridges & Co.* 16 Ib. 220; *Dietus v. Fuss*, 8 Md. 157-160.

In actions on contracts, one is liable for the breach from the time he renders himself incapable of performing it, or refuses to perform it, or otherwise violates it. *Sedgwick on Damages*, 6th edit. page 419, note 2 [352]; *Williams v. Woods, Bridges & Co.* 16 Md. 220, 259; *Dugan v. Anderson*, 36 Ib. 581, &c.; 1 Robinson's Practice, 453.

Neither plaintiff nor defendant can claim, after either of these occurrences, that any *locus penitentie* remains which postpones the period at which the damages are to be estimated; nor can it be postponed by any subsequent demand for the performance of it made by the plaintiff, after the contract had been disaffirmed or violated by the defendant, or the performance of it had become impossible. *Williams v. Woods, Bridges & Co.* 16 Md. 220, 259; *Baltimore Marine Ins. Co. v. Dalrymple*, 25 Ib. 304-5.

BARTOL, C. J., delivered the opinion of the court.

This suit was brought by the appellee, to recover the value of certain coupon bonds and stocks, that passed like bank notes, by delivery; which had been deposited by the plaintiff with the defendant, and which had been stolen from the defendant, in consequence of its alleged failure to exercise ordinary care in the custody of them.

The case is one that, from its nature, depended at the trial below mainly on the questions of fact arising upon the evidence, with regard to the manner in which the bonds were lost, and the vigilance and care exercised by the bank in their custody. These were questions exclusively for the jury, whose province it was to decide whether there was any want, or omission of ordinary care and diligence on the part of the bank, from which the loss of the plaintiff's property resulted. These questions were submitted to the jury by the circuit court, were decided by them against the bank, and we have no authority or power to review their verdict.

All the prayers asked by the defendant, being either conceded by the plaintiff's counsel or granted by the circuit court except the *tenth*; the only matters presented for our consideration on this appeal arise upon the defendant's *tenth* prayer, which was refused; and the *first, fourth, fifth, sixth, and seventh* prayers of the plaintiff, which were granted.

It appears by the evidence that the appellant was a bank organized under "*the National Currency Act of 1864.*" The firm of William A. Boyd & Co., of which the appellee was senior member, was a large customer of the bank, through which all the banking business of the firm was transacted, and from which it received accommodations as needed. On the 5th day of February, 1866, the firm was indebted to the bank about \$5,000, when the appellee voluntarily proposed to the president of the bank, to deposit with the bank a large amount of bonds, about \$37,000, as collateral security for his present and future indebtedness. The terms of the deposit, as agreed on between Mr. Boyd and the president, were dictated by the latter to the discount clerk — and were as follows: —

"THIRD NATIONAL BANK,
February 5th, 1866.

"William A. Boyd has deposited with the Third National Bank of Baltimore \$20,000 in United States 5-20 bonds, and \$1,500 5-20, July, 1865; \$5,000 Hudson County, New Jersey; \$5,000 Town of Saratoga, New York, 7 *per cent.* bonds; \$5,000 Stock of Third National Bank of Baltimore, as collateral security for the payment of all obligations of Wm. A. Boyd and Wm. A. Boyd & Co. to the Third National Bank of Baltimore, at present existing, or that may be incurred hereafter, with the understanding that the right to sell the above collaterals, in satisfaction of such obligations, is hereby vested in the officers of the Third National Bank.

[Signed] A. H. BARNITZ, *Discount Clerk.*"

This paper was kept by the cashier of the bank in the same envelope with the bonds, — afterwards *memoranda* were inclosed therein, signed by the appellee's attorney and by the cashier, showing that certain of the bonds originally deposited had been withdrawn, and others deposited to replace them.

It appears from the evidence "that while these collaterals remained in the bank, the firm kept a deposit account with the bank, having an average amount of about \$4,000 on deposit, and from time to time as it needed, obtained discounts ranging from \$2,000 to \$15,000 on the security of the collaterals, but frequently, and for considerable times, as much as five months at a time, it sometimes owed the bank nothing, but left the bonds in its vault; that at times when the firm wanted money for a very short time, it had obtained it from the bank, on the security of these collaterals on what were called 'call loans,' by checks such as the following:—

"Baltimore, July 13, 1871.

"Third National Bank of Baltimore pay to order of call loan on general collaterals, *four thousand dollars.*

WILLIAM A. BOYD & Co."

"The firm was not indebted to the bank subsequent to July, 1872, when it paid its last indebtedness; the bonds were not withdrawn, but left with the defendant, under the original agreement." The bank was robbed and the bonds stolen in the manner described in the testimony, between Saturday evening, the 17th, and Monday morning, the 19th of August, 1872. It appears from the proof that the giving of the bonds as collateral security, was the voluntary act of the plaintiff, not done at the instance or request of the defendant; that the bank officers considered the account of the plaintiff's firm a very desirable one, and considered the arrangement, by which every liability of theirs was secured by the collaterals, very advantageous to the bank; "which was under no obligation to lend them anything; but the bonds and stocks were to be held as collateral security for all loans that might be made to them, and for their liability on any paper signed or indorsed by them, which might at any time be held by the bank."

The defendant, by its *tenth* prayer, asked the court to instruct the jury, "That the defendant had no power, by the act of Congress under which it was incorporated, to assume and undertake the keeping of the plaintiff's bonds, while they were not held as collateral security for debts owing to it; and if the jury shall find that when the bonds were stolen . . . there was not and had not been for nearly three weeks any indebtedness for which they were held as security, then the plaintiff cannot recover in this action."

This prayer raises the question of the power of the bank to accept and retain the deposit of the plaintiff's bonds, in the manner and for the purpose disclosed in the evidence. Having been organized under the Act of Congress of 1864, ch. 106, the powers of the bank are limited and defined by the provisions of that act.

By section 8, it is authorized "to exercise all such incidental powers as shall be necessary to carry on the business of banking by discounting promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security, and by obtaining, issuing, and circulating notes according to the provisions of this act."

The construction of this section was considered by this court in *Weckler v. First National Bank of Hagerstown*, 42 Md. 581. The precise ques-

tion, however, now presented did not arise in that case. There the attempt was made to hold the bank responsible for alleged fraudulent representations made by its teller in the sale of bonds of the Northern Pacific Railroad Company, which the *narr.* alleged the bank was engaged in selling on commission. It was decided, that "the business of selling bonds on commission was not within the scope of the powers of the corporation," under the act of Congress to which we have referred. It was further held that the defence of *ultra vires* was open to the bank under the decision in "*The Steam Navigation Co. v. Dandridge*, 8 G. & J. 318, 319; and consequently that the bank was not responsible for any false representations made by its teller to the plaintiff, whereby she was induced to purchase the bonds in question." It is contended that the case now under consideration comes within that decision. In the argument of the cause, the counsel for the appellant has treated the transaction as a mere gratuitous deposit, simply for the convenience or accommodation of the appellee, and for the purpose of affording a place of safe keeping for his bonds, and has argued that the bank had no power to accept a bailment of that kind, or in other words to become a mere safe deposit company, and was not therefore responsible for the loss. There is very strong ground, both upon reason and authority, in support of the proposition that a national bank, deriving its existence and exercising its powers under the act of Congress referred to, is not authorized to enter into a contract as a mere gratuitous bailee, by receiving on special deposit for safe keeping merely, coin, jewelry, plate, bonds, or other valuables. Such a contract does not appear to be authorized by the terms of the 8th section, as a transaction "within the ordinary course and business of banking or incident to it;" and has been decided by the supreme court of Vermont to be unauthorized by the law, and beyond the scope of the corporate powers. *Wiley v. First National Bank of Brattleboro'*, 47 Verm. 546. The very well considered opinion by Judge Wheeler in this case will be found in *The American Law Register*, N. S. vol. 14, p. 342, accompanied by an able note from the pen of Judge Redfield, in which the cases are collected and reviewed.

In the case of *The First National Bank of Lyons v. The Ocean National Bank*, 60 N. Y. 278, the court of appeals of New York have recently made a similar decision.

Assuming these decisions to be correct, and we are not disposed to question their soundness, it is clear that the contract entered into by the bank in this case, was not a mere gratuitous bailment. As shown by the paper of February 5, 1866, the bonds were not received on special deposit, *for safe keeping merely*, but were received as collateral security for a debt then existing, and for all obligations that might thereafter be incurred by the depositor.

We entertain no doubt of the power of the bank to enter into a contract of that kind. To accept such collateral security for existing debts, and for future loans and discounts, is a transaction within the usual course of the business of banking, and incident thereto, and therefore within the terms of the act of Congress.

The power of national banks to receive such deposits was distinctly recognized by the supreme court of Vermont, and the court of appeals

of New York, in the cases before cited, and we are not aware that it has ever been questioned. On this point we refer to the able opinion of Judge Sharswood, in *Erie Bank v. Smith, Randolph & Co.* 3 Brewster, 9.

In *Maitland v. The Citizens' National Bank*, 40 Md. 540, this court affirmed the right of a national bank to receive on deposit the note of a third person as collateral security for future loans or advances to the depositor.

The original contract of bailment being valid and binding, the obligation of the bank for the safe custody of the deposit did not cease when the appellee's debt had been paid. There is no evidence that the contract was changed; on the contrary, the evidence shows "the bonds remained with the bank under the original agreement," as collateral security for any indebtedness of the appellee that might thereafter accrue, and for any liability of himself or of the firm of which he was a member, or any paper signed or indorsed by them, which might at any time be held by the bank. For these reasons the circuit court committed no error in refusing the appellant's tenth prayer.

The appellant's counsel have argued that the memorandum of February 5, 1866, cannot be construed as a contract made by the appellant, because it does not appear that the officers by whom it was made were authorized to bind the bank.

This point is not properly before us, was not made in the circuit court, and is not presented by the bill of exceptions. All the prayers of the appellant go upon the theory that the bonds were held by the bank as collateral security.

But even if the question of the authority of the officers to bind the appellant were open on this appeal, it may be observed that the contract of bailment being one which it was competent for the corporation to make, and having been made by its officers, acting within the scope of their general powers and apparent authority, and in the exercise of powers usually delegated to like officers, the bank would be estopped to deny their authority. It may be added further, that there was evidence from which the jury might properly have inferred that the authority had been conferred upon the president and cashier, and that their acts were known to and sanctioned by the directors. *Union Bank v. Ridgely*, 1 H. & G. 325, 413, 430.

But as we have before said, the question of the authority of the officers to act for the bank in the transaction is not before us. 29 Md. 2, Rule 4.

With respect to the several prayers of the appellee which were granted by the circuit court, and referred to in the bill of exceptions, we do not understand that any objection is made to them by the appellant, so far as they instructed the jury upon the question of the degree of care which the appellant's officers were bound by law to exercise in the custody of the appellee's bonds. In this respect they do not differ from the prayers granted at the instance of the appellant.

By the appellee's first prayer, the jury were instructed that the defendant would be responsible if the jury found from the evidence that the bonds had been stolen, "in consequence of the failure on the part of the

defendant to exercise such care and diligence in the custody or keeping of them as at the time banks of common prudence, in like situation and business, usually bestowed in the custody and keeping of similar property belonging to themselves; that the care and diligence ought to have been such as was properly adapted to the preservation and protection of said property, and to have been proportioned to the consequence likely to arise from any improvidence on the part of the defendant." No objection has been made, nor could any be justly urged against this proposition. The prayer further instructed the jury, that in determining whether or not such care and diligence were used, "the jury may take into consideration whether it was a proper precaution for the defendant to have had an inside watchman at night, and on Sundays, whether such watchman ought to have kept awake at night, and whether the bank ought ever to have been without an inside watchman at any part of the day on Sunday, and that they may take into consideration the nature and value of said bonds, their liability to loss, the temptation they offered to theft, the difficulty of recovering them if stolen, the situation of the building and vault, and the sufficiency of the safe in which the defendant kept them at the time they were stolen."

Exception has been taken to the last part of the prayer, because of the enumeration of certain questions, as proper to be considered by the jury, in determining whether such care and diligence had been used by the bank as was defined in the prayer. But we find no error in this part of the instruction: the particular subjects of inquiry mentioned were proper for the consideration of the jury; their province was not invaded, nor was there anything to mislead them; they were not told that in any of the particulars mentioned the evidence showed a want of due and ordinary care on the part of the bank; and by the appellee's *seventh* prayer, they were instructed, "that it was a question to be determined by them from all the facts and circumstances of the case, whether there was or was not that degree of care and diligence used by the defendant in the protection and preservation of the plaintiff's property which is defined in the plaintiff's first prayer."

The degree of care and diligence required by the law was properly defined by the circuit court; the question whether it has been exercised by the defendant was fairly submitted to the jury upon all the facts and circumstances of the case. This was a question of fact, exclusively within the province of the jury to decide; we have no power to disturb their verdict; and we have refrained from stating the facts and circumstances showing the manner in which the most extraordinary and unforeseen robbery was committed upon the bank.

The only question left for us to consider is as to the proper measure of damages. This was decided by the circuit court to be "the value of the bonds at the time they were stolen." The appellant contends that this was error, and insists that the true measure is their value on the 9th day of September, 1872, when they were demanded by the appellee. It appears by the agreement of counsel that the bonds had slightly diminished in value between the time of the robbery and the time they were demanded. At the former date, they were worth \$25,911.25, and at the latter, their value was \$25,400.63.

In our opinion, the rule laid down by the circuit court is correct. In a case of this kind, the measure of damages is the value of the property lost; the only question is at what time is this value to be computed. Its value not being fixed and permanent, but liable to fluctuate, the time fixed for ascertaining it may become of much importance, and has been the subject of considerable discussion in the courts, and the decisions are by no means uniform. In Maryland, the measure of damages in *trover* is ordinarily the value of the property at the time of the conversion; *Hepburn v. Sewell*, 5 H. & J. 211; *Sterling v. Garritee*, 18 Md. 468; and we think the same rule may, by analogy, be applied to the present case. Here the ground of the action is the alleged breach of the contract of bailment, by reason of the failure on the part of the bank to exercise due care in the custody of the bonds, whereby they were lost; the true measure of damages would seem to be their market value, computed at that time. This question arose in *Balto. Marine Ins. Co. v. Dalrymple*, 25 Md. 244. In that case there was a pledge or hypothecation of stock as collateral; the contract of bailment having been broken by the illegal sale of the stock by the bailee, the other party being cognizant of the breach waited for two years, and the stock having risen in the market demanded the same, offering to redeem, and claimed that the value of the stock should be computed at the time of his demand. But it was held that the measure of damage was its value at the time of the breach.

Without repeating the reasons and authorities upon which that decision was placed, we refer to the opinion of the court, at pages 305, 306, 307, 308.

In *Maury & Osbourn v. Coyle*, 34 Md. 235, cited by the appellant, it was ruled that the plaintiff was entitled to recover the value of the bonds deposited, ascertained at the date they were demanded. But that case is not applicable here; there was no evidence of the time when they had been lost, or that they had changed in value; and the contract there sued on was not the same as this. In that case, by the contract of bailment, the bailee had the option to return the securities deposited, or their value in money, on demand. In this case, the legal obligation of the bailee was to keep the bonds of the appellee safely, and to return *them* to him when the contract ended. Strictly, this obligation could not be discharged by the payment to the appellee of their value in money; after the bonds had been lost, and it had become impossible to return them, there was no necessity for a demand, and when made, it could have no significance or effect, in determining the rights of the parties; these had become fixed when the breach occurred by the loss of the bonds, and, in our judgment, the proper measure of damages is their value computed at that time. Finding no error in the rulings of the circuit court, the judgment must be affirmed.

Judgment affirmed.

CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

[JANUARY, 1877.]

MUNICIPAL BONDS. — TAXATION. — MANDAMUS, ETC.

SIBLEY v. THE CITY OF MOBILE.

1. Where an act of the legislature authorized a city to issue its bonds in aid of a railroad company, and ratified a contract by which the city, having issued its said bonds, agreed to appropriate sufficient moneys from its treasury to pay the accruing interest thereon, the city was thereby authorized to levy a tax to pay said interest, and such authority carried with it the duty to make the levy.
2. But when at the time of the issue of the bonds the Constitution of the state limited the taxing power of the city to a certain per centum upon its taxable property, the city could not exceed that limit; but having first levied a tax sufficient to pay its current expenses, it was bound by its contract to exhaust, if necessary, the residue of its taxing power in order to pay the interest on said bonds.
3. Where such a constitutional limit to the taxing power existed, it was not competent for the legislature, by an act passed after the issue of said bonds, to direct that the entire taxing power of the city should be exhausted for the payment of the holders of bonds of another issue who had no specific claim upon the fund raised by taxation, or any part thereof.
4. Where the taxing power of the city was limited by the Constitution, all the holders of the bonds issued by the city were entitled to share *pro rata* in the general fund raised by taxation, which remained after the payment of the current expenses of the city.
5. A city with a limited power of taxation which, by neglect to levy and collect taxes, has permitted the interest on certain of its bonds to fall in arrears, cannot defend against an application for the writ of mandamus to compel the levy of a tax to pay a judgment recovered for interest due on bonds of a later issue, by alleging that a levy to pay the interest in arrears on the older issue would exhaust its taxing power, when at the same time it expresses no purpose to levy a tax for that object.

HEARD on motion for peremptory mandamus. The case was as follows: —

On February 23, 1876, the plaintiff recovered in this court against the city of Mobile a judgment for \$23,560. The judgment was based on five hundred semi-annual interest coupons for \$40 each, which had been originally attached to one hundred bonds for \$1,000 each, issued by the city of Mobile in aid of the Mobile and Alabama Grand Trunk Railway Company. The authority to issue these bonds was based on an ordinance of the city dated June 25, 1869, and afterwards, and before the issue of the bonds, confirmed by an act of the Legislature of Alabama, dated January 17, 1870.

The ordinance, after setting out the terms of a contract between the city of Mobile and the railroad company, by which the city agreed to loan its bonds to the latter, authorized the issue of the bonds, and declared that "the city shall be bound to appropriate sufficient moneys from its treasury to pay the interest provided to be paid by the city," to be raised at the option of the city by general or special tax.

The act of the legislature, after first approving the ordinance and a contract for the issue of the bonds made by the city with the railroad

company in pursuance of the ordinance, and declaring said contract "legal and binding on the city," enacted as follows: "The corporate authorities of said city of Mobile shall have and they are hereby invested with power and authority to adopt such ordinances, by-laws, and resolutions, and to provide such ways and means as shall be necessary or proper for the full execution and performance of said contract so made with said railroad company."

The bonds having been issued in pursuance of the authority conferred by the ordinance and the act of the legislature were put in circulation, and the city having five times made default in the payment of the semi-annual interest, suit was brought upon the dishonored coupons and the judgment above mentioned recovered. Execution was issued on the judgment and returned unsatisfied, whereupon a demand was made upon the city authorities that they should levy a tax to pay the judgment, which they refused to do.

Thereupon, according to the practice in the state courts of Alabama, a petition was filed against the city of Mobile, asking for a rule *nisi* upon the city, calling upon it to show cause why the peremptory writ of mandamus requiring it to levy such tax should not issue. The rule was allowed and the city filed its answer thereto.

The answer denied that it was the legal duty of the city to levy the tax, and in support of this averment stated, that by the Constitution of the State of Alabama, in force when said ordinance and act of the legislature were passed and said bonds issued, the city of Mobile was restrained from collecting a greater tax than two per centum upon the assessed value of its taxable property; and by the Constitution now in force, the same limitation of the power of the city to tax still existed, with this additional provision, that for the payment of its existing indebtedness the city could levy not more than one per cent. upon its taxable property; and for its current expenses not more than one per cent.

The answer further alleged that over and above the sum necessary for the expenses of the city government, there could be collected for the year 1877, under the limitations of the Constitution of Alabama, not more than \$145,000, applicable to the payment of the city debt; that there remained due and unpaid of the principal of a series of bonds issued by the city, by authority of an act of the legislature passed in 1843, the sum of \$3,100, and four years' accrued interest amounting to \$3,600, and that for the payment of the said principal and interest the taxes upon the real estate of the city were pledged and appropriated.

That there was also outstanding and unpaid of the principal of a series of bonds issued by the city by authority of an act of the legislature passed in 1858, the sum of \$137,000, besides four years' arrearages of interest amounting to \$43,840, making a total of \$180,840, to provide for which and the annually accruing coupons the city was bound, under its contract and by virtue of the act of the legislature aforesaid, to provide by an annual tax a sum at least proportional to the original amount; that is to say about the sum of \$17,000.

The answer further stated that on January 1st, 1876, the bonded debt of the city, principal and interest, amounted to \$3,332,901, of which \$880,094 were for bonds and interest thereon issued to the Mobile and

Alabama Grand Trunk Railroad Company, and of which the debt claimed by the relator formed a part; that it was impossible for the city with the means at its command to pay this debt, the annual interest on which amounted to \$200,000, while the maximum of taxation allowed for all purposes on the taxable property of the city would only produce a sum not exceeding \$340,000.

The answer further alleged that a compromise of the debt was all that was practicable; accordingly, the legislature of the state by an act approved March 9, 1875, provided for the reduction and funding of the debt of the city. The act authorized the city to issue \$2,000,000 of coupon bonds, for the purpose of settling and funding its debts, and created a contract lien "on the yearly revenues of the city, to be raised by taxation each year, to the extent necessary to pay the interest on said bonds due and falling due each year, and to raise a sinking fund of \$50,000 each year for the payment of the principal of said bonds." And the said act restricted the power of the city to levy taxes to the raising of such amounts as might be necessary to discharge the interest on the bonds therein provided for, and for the said \$50,000 for the sinking fund, and for such sum as might be necessary to pay the current expenses of the city government.

The answer further alleged that \$1,185,500 of bonds had been issued under the said Act of March 9, 1875, and that the city was compelled to raise for the current year under said act the sum of \$121,130, which was declared to be a lien on the revenues of the city raised by taxation; that the funding and adjusting of the city debt was still in progress, and other bonds were being issued, so that the amount to be raised for interest was being continually increased.

The city therefore affirmed that all its powers to levy taxes to pay debts would be entirely exhausted in the effort to provide for those claims of its bonded debt for which special provision had been made under authority of the legislature, and that no margin would be left out of which to pay debts not thus provided for, and relator's coupons belonged to a class of debts for which no special provision was made.

The city therefore insisted that it had not the power or authority to levy the taxes which the relators prayed the court to require it to levy.

When the acts of 1848 and 1858, above referred to, were passed, there was no constitutional limit on the taxing power of the city.

To this answer of the city the relators demurred, and upon this demurrer the case was argued and heard.

Geo. N. Stewart and Harry Pillans, for the relators.

Stevens Croom, city attorney, and *Peter Hamilton*, for the city of Mobile.

WOODS, Circuit Judge. The act of the legislature of January 17, 1870, conferred ample authority upon the city of Mobile to issue the bonds from which the coupons of relators were detached, and even without express authority to that effect implied an authority to levy a tax for their payment. *Loan Association v. Topeka*, 20 Wall. 655; *Gibbons v. The Railroad Co.* 36 Ala. 439; *Ex parte Selma & Gulf Railroad Co.* 45 Ala. 730; *State v. Commissioner of Clinton Co.* 6 Ohio State, 280; *United States ex rel Ranger v. New Orleans*, 2 Woods, 280.

Besides the implied power there is an express agreement on the part of the city set out in the ordinance of June 25, 1869, and approved and ratified by the legislature by the Act of January 17, 1870, by which the city bound itself to appropriate sufficient moneys from its treasury to pay the interest, and reserved to itself the right to raise the same by special tax, which reservation was also approved by the same act of the legislature.

The city acted upon this authority, and, as its answer shows, for several years levied a special tax to pay the interest on the bonds issued to the Mobile and Alabama Grand Trunk Railway Company.

The authority to levy the tax for the payment of the interest on these bonds carries with it the duty to make the levy. The power to levy the tax is in the nature of a trust for the benefit of the holder of the bonds. The rights of the creditor and the ends of justice demand that it should be exercised in favor of affirmative action, and the law requires it. *City of Galena v. Amy*, 5 Wall. 708; High on Ex. Rem. sec. 397; *Supervisors v. United States*, 4 Wall. 485.

When the bonds which relators hold were issued, the law authorized, and in effect required, the levy of a tax to pay the interest thereon as it accrued. This law formed a part of the contract as much as if it had been written on the face of the bonds. *Gelpcke v. Dubuque*, 1 Wall. 175; *Van Hoffman v. Quincy*, 4 Wall. 557; *Gunn v. Barry*, 15 Wall. 610; *Commissioners v. Rather*, 48 Ala. 446; *Milner's Adm'r v. Pensacola*, 2 Woods, 641.

The city of Mobile, by its ordinance confirmed by act of the legislature, has agreed to pay the interest on these bonds semi-annually, either out of its general revenue or by special tax. This contract is of course subject to the constitutional limit upon the taxing powers of the city restricting it to a levy not to exceed two per cent. per annum.

The question is therefore presented by the demurrer to the answer whether it was competent for the legislature, by an act passed subsequent to the issue of these bonds, to exhaust all the taxing power of the city and direct the application of the proceeds of such taxation to other subjects, to the exclusion of the issue of bonds of which the relator holds a part. After authorizing the city to issue these bonds, and after approving the contract of the city to pay the interest semi-annually either by a general or special tax, can the legislature authorize and direct that all the taxing power of the city shall be exercised for the benefit of the holders of other bonds who have no specific claim upon the funds raised by taxation or any part thereof, to the exclusion of these? In my judgment such an act would be a violation of the rights of the holders of the bonds thus excluded, and an impairment of their contract with the city of Mobile.

These bondholders are entitled to have all the taxing power of the city within the constitutional limit exercised, if necessary, to secure the performance of the contract made by the city with them. When that power is exercised the current expenses of the city must be paid out of the fund so raised, and as to the residue, the relators are entitled to share *pro rata* with the other creditors of the city who have no specific lien or claim to any portion of the taxes; and neither the city nor the

legislature has the power to appropriate the taxing power of the city for the exclusive benefit of a class having no superior rights, while these relators have a contract in effect declaring that a part of the taxing power of the city shall be exercised for their benefit.

It appears from the answer of respondent that certain sums are due the holders of bonds issued under the acts of 1843 and 1858 for unpaid interest, and the answer avers that if these sums are paid, and also the sum required by the Act of 1875, the taxing power of the city for the current year will be exhausted.

But there is no averment that it is the purpose of the city to levy any tax to pay the past due interest referred to; and excluding taxation for such purpose it appears that the city will not exceed its power to tax, if it should levy a sufficient sum to satisfy the judgment of the relators. Moreover the bonds issued by authority of the acts of 1843 and 1858 cannot be affected by the limit imposed on the taxing power of the city by a constitution adopted after the issue of the bonds.

These relators are here pressing their right to be paid by taxation. The city cannot protect itself from its obligation founded on its own contract to levy the tax, by showing that it has failed in former years to do its duty by its creditors, and allowed interest to accumulate, while at the same time it expresses no purpose to levy a tax to pay such interest due and unpaid.

In my judgment the facts set up in the answer of the city of Mobile constitute no reason why the writ of mandamus asked for by the relators should not issue.

The demurrer to the answer is, therefore, sustained.

COURT OF APPEALS OF MARYLAND.

(To appear in 44 Md.)

CONSOLIDATION OF RAILROAD CORPORATIONS. — CONSTITUTIONAL LAW.
POWER OF LEGISLATURE TO REPEAL CHARTER. — TAXATION, ETC.

STATE OF MARYLAND v. NORTHERN CENTRAL RAILWAY CO.

SAME v. SAME.

The Baltimore and Susquehanna Railroad Company was chartered by the Act of 1827, ch. 72, of Maryland, to construct a road from the city of Baltimore to the Susquehanna River. The charter was accepted, the company was organized, and the road constructed. The capital stock of the company was one million dollars, with power to increase it to two millions. By the 20th section of the act of incorporation, it was provided that the shares of the capital stock of the company should be deemed and considered personal estate, and should be exempt from the imposition of any tax or burden. By the Act of 1854, ch. 250, the stockholders of the Baltimore and Susquehanna Railroad Company were authorized to unite and consolidate their company or corporation, with three other railroad companies, lying within the State of Pennsylvania, so as to form one corporation, to be called "The Northern Central Railway

Company," on such terms and conditions, and conformably to such agreements and regulations, as the said several companies might respectively determine and adopt, subject however to the following, among other conditions set forth in said act: That all laws made in reference to the Baltimore and Susquehanna Railroad Company not repealed or modified by the Legislature of Maryland should be binding and operative upon the said consolidated company, so far as its property or operations might be within said state, and so far as said laws might be applicable to, and consistent with, the new organization of the said consolidated company; that the said consolidated company should have the power to establish its capital stock to an amount not exceeding eight millions of dollars; that the said company should possess all the corporate powers and privileges, and be subject to all the duties and obligations, not inconsistent with the act and its general intent, which were expressed in the charter granted to the Baltimore and Susquehanna Railroad Company and its supplements. In pursuance of this act, and corresponding acts of the Legislature of Pennsylvania conferring authority on the three corporations of that state, articles of union and consolidation were executed, by which all the property, rights, privileges, and immunities belonging to the said several companies were transferred to, and became vested in, the body corporate formed by the consolidation. By section 47 of article 3 of the Constitution of 1850, the legislature could create no corporation by special act except on condition that it should be subject to change, alteration, or repeal. The constitutions of 1864 and 1867, subsequently adopted, contained a similar provision. The Act of 1866, ch. 157, provided for the taxation of all property in the state, and repealed all laws exempting property from taxation. By the Act of 1870, ch. 362, it was provided, "That all and every provision contained in the charter, or supplements thereto, of any railroad company incorporated by the laws of this state, or contained in any law heretofore passed by the legislature of this state, whereby the stock, or property, real or personal, of any railroad company . . . is exempted from taxation, be and the same is hereby repealed." The Act of 1872, ch. 234, provided "that a state tax of one half of one per centum be and the same is hereby levied annually upon the gross receipts of all railroad companies worked by steam, incorporated by or under authority of the state, and doing business therein." In an action by the state to recover from the Northern Central Railway Company a tax of one half of one per cent., levied under the Act of 1872, ch. 234, on its gross receipts, for a part of the year 1872, and for the whole of 1873, from that part of its road lying within the State of Maryland, and which formerly belonged to the Baltimore and Susquehanna Railroad Company, it was held:

- 1st. That although the corporate rights and privileges formerly belonging to the Baltimore and Susquehanna Railroad Company were, by the express terms of the Act of 1854, ch. 250, vested in the consolidated company, and the provisions of the Act of 1827, ch. 72, incorporating the original company, were to that extent embodied in, and reenacted by, the said Act of 1854, ch. 250, yet the rights and privileges thus conferred became new and special grants to the consolidated company, dating from the period when the said Act of 1854 went into operation.
- 2d. That the defendant was created a new corporation by virtue of the Act of 1854, and it was under that act alone that it derived all its franchises, rights, privileges, and immunities.
- 3d. That as the Constitution of 1850 was in force when the Act of 1854, under which the defendant was incorporated, went into effect, the legislature had the right to repeal or revoke the exemption from taxation claimed by the defendant under said act.
- 4th. That as the power to alter or repeal the charter of the defendant was reserved to the state, under the Constitution of 1850, as fully as if such reservation had been set forth in express terms in the act of incorporation, the right to exercise this power could not in any manner be affected by the adoption of the constitutions of 1864 and 1867.
- 5th. That the charter of the defendant must be construed as if the right to alter, amend, or repeal it had been reserved to the legislature, by the express language of the charter itself.
- 6th. That it was not within the power of the legislature, under the Constitution of the state, to grant to the defendant immunity from taxation, or any other corporate privilege, beyond the power of repeal or revocation by a subsequent legislature.

7th. That the provisions of the acts of 1866, ch. 157, 1870, ch. 362, and 1872, ch. 234, were repugnant to, and inconsistent with, the exemption from taxation claimed by the defendant under the Act of 1854, and as these several acts could not stand together, the former must be considered as a repeal of the latter.

8th. That the tax imposed by the Act of 1872, ch. 234, upon the gross receipts of the defendant was a valid tax, and in nowise in conflict with article 15 of the Bill of Rights, which requires that all taxation laid on property should be uniform and equal.

APPEALS from the superior court of Baltimore city.

These two suits were instituted by the appellant against the appellee: the one on the 6th of September, 1873, to recover a tax of one half of one per cent. levied under the Act of 1872, ch. 234, on the gross receipts of the defendant from the 1st of April to the 31st of December, 1872, from that part of its road lying within the State of Maryland, and which formerly belonged to the Baltimore and Susquehanna Railroad Company; the other on the 14th of July, 1874, to recover a like tax on the gross receipts of the defendant for the year 1873. The Act of 1872, ch. 234, was repealed, and reenacted with amendments by the Act of 1874, ch. 408. A further statement of the cases is contained in the opinion of this court. They were submitted to the court below for determination, without the aid of a jury.

The plaintiff prayed the court among other things to rule and decide as matter of law, as follows:—

1st. That the acts of 1872, ch. 234, and 1874, ch. 408, under which these actions were instituted, do not, nor do either of them, impair the obligation of any contract within the meaning of the 10th section of article 1, of the Constitution of the United States. And that for anything in the Constitution of the United States contained, the plaintiff is, under the admitted facts of these causes, entitled to recover the amount of taxes claimed in each of said suits.

2d. That for anything in the Bill of Rights, or Constitution of the State of Maryland, on the admitted facts in these suits, the plaintiff is entitled to recover, as to the taxes claimed in each of said suits.

The defendant prayed the court to rule and decide, as matter of law, as follows:—

1st. That the defendant is not chargeable with any tax on its gross receipts under the Act of 1872, ch. 234, nor under the Act of 1874, ch. 408, as under the charter of said defendant contained in the acts of 1854, ch. 250, and 1827, ch. 72, said defendant is exempted from said tax; and the imposition of said tax on the defendant by said State of Maryland is a violation and impairment of the contract made by the said state with the defendant in the charter of said defendant, and therefore upon the facts as agreed on in this case, the verdict and judgment of the court must be for the defendant.

2d. That the attempted imposition of the tax on gross receipts of railroad companies by the Act of 1872, ch. 234, and the Act of 1874, ch. 408, is in violation of the 15th article of the Bill of Rights of the Constitution of the State of Maryland, and is therefore illegal, and under the facts agreed on in this case, the verdict and judgment of the court must be for the defendant.

The court refused to rule as prayed by the plaintiff, but ruled and decided as asked by the defendant. The plaintiff excepted.

The court (Dobbin, J.) rendered a verdict in each case for the defendant; and judgment was entered accordingly. The plaintiff appealed.

John H. Handy & The Attorney General, for the appellant.

Bernard Carter, *contra*.

ROBINSON, J., delivered the opinion of the court.

The Baltimore and Susquehanna Railroad Company was chartered in 1827, for the purpose of constructing a railroad from the city of Baltimore to the Susquehanna River, with a capital stock of \$1,000,000, and with power to increase the stock to \$2,000,000.

By the Act of 1854, ch. 250, the stockholders of said company were authorized to unite and consolidate with "The York and Maryland Line Railroad Company," "The York and Cumberland Railroad Company," and "The Susquehanna Railroad Company," corporations chartered by and lying in the State of Pennsylvania, so as to form one corporation, to be called "The Northern Central Railway Company," on such terms and conditions, and conformably to such agreements and regulations, as the said several companies might respectively determine and adopt, subject, however, to the following, among other conditions set forth in said act:—

That all laws made in reference to the Baltimore and Susquehanna Railroad Company, not repealed or modified by the Legislature of Maryland, should be binding and operative upon the said consolidated company, so far as its property or operations were within said state, and so far as said laws were applicable to, and consistent with, the new organization of the said consolidated company.

That the said consolidated company should have the power, from time to time, to establish its capital stock to an amount not exceeding eight millions of dollars.

That the said company should possess all the corporate powers and privileges, and be subject to all the duties and obligations, not inconsistent with the act and its general intent, which were expressed in the charter granted to the Baltimore and Susquehanna Railroad Company, or in the supplements to that charter.

The act further provided that it should go into effect whenever the several corporations had agreed to consolidate their several companies into one, and had agreed upon the terms and conditions of such consolidation, and had made a full report thereof, duly certified, to the governor of Maryland, to be recorded in the office of the secretary of state.

Power to unite and consolidate with the Baltimore and Susquehanna Railroad Company was also granted to the three Pennsylvania companies by the legislature of that state.

The Act of 1854 was accepted by the stockholders of the Baltimore and Susquehanna Railroad Company, and articles of union were executed, by which all the property, rights, privileges, and immunities belonging to the said several companies were transferred to the new company.

By the 20th section of the Act of 1827, ch. 72, which was the charter of the Baltimore and Susquehanna Railroad Company, it was provided that the shares of the capital stock of the said company should be deemed and considered personal estate, and be exempt from the imposition of any tax or burden.

It is claimed by the appellee, that as the Maryland Act of 1854 provides that the Northern Central Railway Company should possess the corporate powers and privileges granted to the Baltimore and Susquehanna Railroad Company by the Act of 1827, it follows that the capital stock which the Northern Central Railway Company was authorized to issue under the Act of 1854 is exempt from taxation; and that inasmuch as these shares of stock represent all the property of the company, such property is in every form also exempt from taxation.

Conceding this to be true, and conceding, also, that the legislature had the power, under the Constitution of this state, to exempt the shares of stock and property of the appellee from the imposition of any tax or burden—questions unnecessary to be decided in the view we take of this case—the question is whether the exemption thus claimed is beyond the power of the legislature to repeal?

There is no provision in the Act of 1827, incorporating the Baltimore and Susquehanna Railroad Company, nor in the Constitution then in force in this state, nor was there any prior general law reserving to the state the right to amend, alter, or repeal the charter thus granted to the company. The charter must, therefore, be regarded as an executed contract between the state and the corporators, and within the protection of the Constitution of the United States, which ordains that no state shall pass any law impairing the obligation of contracts. *Miller v. State*, 15 Wallace, 488.

So long, then, as the Baltimore and Susquehanna Railroad Company existed as a corporate body, exercising the rights and privileges vested in it under its charter, the legislature possessed no power to subject the shares of its stock to the imposition of any tax or burden. But by the Act of 1854, the stockholders of said company were authorized to unite and consolidate with the three Pennsylvania companies, so as to form a new company, to be called the Northern Central Railway Company. This act was accepted by the stockholders, and in pursuance of its provisions articles of union were executed. It is clear, then, that under the operation of this act, and under the articles of union above referred to, the Baltimore and Susquehanna Railroad Company was by due authority of law merged in the Northern Central Railway Company. To this new company it had transferred all its rights and property; it had extinguished its capital stock; its board of directors had ceased to exist; and all its corporate powers and privileges, by the express terms of the Act of 1854, became vested in the consolidated company. The merger was complete and absolute, and the Baltimore and Susquehanna Company, as a corporation, ceased to exist. In its place, and in the place of the three Pennsylvania companies, a new corporation was created. The corporate rights and privileges formerly belonging to the Baltimore and Susquehanna Company were, it is true, vested in the new company, and the provisions of the Act of 1827, incorporating the original company, were to that extent embodied in, and reenacted by, the Act of 1854. But the rights and privileges thus conferred, became new and special grants to the Northern Central Railway Company, dating from the period when the Act of 1854 went into operation.

Other rights and privileges were also granted to the corporation thus

created: the power to make and use a common seal, to elect a board of directors, to increase its capital stock to eight millions of dollars, to issue bonds convertible into stock, and, in the language of the act, to make such provisions and regulations as may be necessary to create and establish said consolidated company.

In no sense, then, can it be said that the appellee was created by the articles of union executed by the respective companies.

The stockholders of the Baltimore and Susquehanna Company were authorized by the Act of 1854 to consolidate with the Pennsylvania companies, and the acceptance by them of this act, and the execution of articles of union, were conditions precedent to the incorporation of the new company; but when these conditions were complied with, the appellee as a corporation derived its existence and was in terms created by the operation of the Act of 1854. Now, when this act was passed, the Constitution of 1850 was in force in this state, which ordained:—

“That corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the object of the corporation cannot be attained under general laws. All laws and special acts pursuant to this section may be altered from time to time, or repealed,” &c. Sec. 47, art. 3. The constitutions of 1864 and 1867, subsequently adopted in this state, each contains a similar provision.

We cannot overlook the reasons which led to the adoption of these provisions in the organic law of the state. The power of the legislature to alter or repeal a charter, unconditionally granted to a private corporation, was no longer an open question; and it had become settled law, that unless there was a reservation either in the charter, or in a general law or the state Constitution, of the right to modify or limit the nature of the contract, the legislature possessed no power to amend or repeal such charter, against the consent, or without the default, of the corporation, judicially ascertained and declared. *Miller v. The State*, 15 Wallace, 488.

The object of this provision in the Constitution of 1850 was to preserve to the state control over its contracts with corporations, and to prevent the grant of corporate powers beyond the interference of the legislature, should the public interests at any time require such interference. It constituted, therefore, a condition upon which every charter was granted and held, and qualified to that extent the contract between the state and the corporators.

The appellee having derived its charter under the Act of 1854, when the Constitution of 1850 was in force, and the exemption from taxation claimed being a part of such charter, the power of the legislature to repeal or revoke the immunity thus granted is, we think, too clear to be questioned. The fact that no such right was reserved in the Act of 1854, incorporating the appellee, can make no difference. The Constitution is the supreme and controlling law, and under its provisions the right to alter, amend, or repeal every charter granted by the legislature to a private corporation is reserved as fully as if such reservation had been made in the charter itself. *Miller v. The State*, 15 Wall. 478; *Tomlinson v. Jessup*, 15 Ib. 457; *Fletcher v. Peck*, 6 Cranch, 136; *Terrett v. Taylor*, 9 Ib. 51.

To hold otherwise would be to decide that the legislature, by omitting such a reservation, could confer a power beyond the interference of the legislature, and thus exercise a power forbidden by the Constitution. The charter of the appellee must therefore be construed as if such reservation had been made in express terms by the Act of 1854. And if so, the case comes directly within the principle laid down in *Washington County v. Franklin Railroad Company*, 34 Ib. 160.

In accepting the Act of 1854, and in the execution of the articles of union, under the operation of which the Baltimore and Susquehanna Railroad Company has merged and ceased to exist, the stockholders are presumed to have known that the corporate powers and privileges granted by that act to the Northern Central Railway Company were subject to the provisions of section 47, article 3, of the Constitution, and that the exemption from taxation claimed under that act was liable at any time to be repealed by the legislature, whenever, in its judgment, the public interests required it. Be that however as it may, it was not within the power of the legislature, under the Constitution of the state, to grant to the appellee immunity from taxation, or any other corporate privilege, beyond the power of a subsequent legislature to repeal or revoke.

This being so, the question is, whether the exemption from taxation claimed under the Act of 1854 has been repealed, and this depends upon the construction of the acts of 1866, ch. 157, 1870, ch. 362, and 1872, ch. 284.

The Act of 1866, known as the general assessment law, provides in general terms for the taxation of all property in the state; and repeals also all laws exempting property from taxation.

The Act of 1870, ch. 362, provides:—

“That all and every provision contained in the charter, or supplements thereto, of any railroad company incorporated by the laws of this state, or contained in any law heretofore passed by the legislature of this state, whereby the stock or property, real or personal, of any railroad company . . . is exempted from taxation, be and the same is hereby repealed.”

The Act of 1872, ch. 284, provides:—

“That a state tax of one half of one per centum be and the same is hereby levied annually, upon the gross receipts of all railroad companies worked by steam.”

And here we are met by the objection, that as there is no reservation in the charter of the appellee of the right to amend or repeal such charter, the power, if it existed, was derived solely from the provisions of the Constitution of 1850; and inasmuch as that instrument had been superseded by the constitutions of 1864 and 1867, subsequently adopted in this state, the power itself no longer existed.

The plain answer to this is, that the reservation under the Constitution of 1850 qualified and became part of the charter, as fully as if it had been incorporated in the act itself. It was the condition upon which the charter was granted, and thus became part of the contract between the state and corporators. If, then, the power to alter or repeal the charter of the appellee was reserved to the state, as fully as if such reservation had been set forth in express terms in the act of incorpora-

tion, the right to exercise this power could not in any manner be affected by the adoption of the constitutions of 1864 and 1867.

We come, then, to the question as to the effect and operation of the acts of 1866 and 1870 and 1872.

It is unnecessary to review the many cases in which courts have considered how far, and under what circumstances, a *subsequent general act* will be held to operate as a repeal of a *prior private act*. As a general rule, it may be admitted that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous act, or unless there is a necessary inconsistency in the two acts. Where, however, the provisions of a general act are entirely inconsistent and irreconcilable with the provisions of a prior private act, the former must necessarily operate as a repeal of the latter, because it is impossible for the two acts to stand together. *Great Central Gas Consumers' Co. v. Clarke*, 103 E. C. L. 812, and 106 Ib. 837; *Queen v. Champneys*, 6 Com. Pleas, L. R. 398; *Canal Company v. Railroad Company*, 4 G. & J. 112; *Mayor of Cumberland v. Magruder*, 34 Md. 386.

In such a case the intention of the legislature, that the latter act should repeal the former, appears by necessary implication. *In re London & Eastern Banking Corporation*, 4 Kay & J. 286; *Thorpe v. Adams*, 6 Com. Pleas, L. R. 123.

Now it must be conceded that the provisions of the several acts above referred to are repugnant to, and inconsistent with, the continuance of the exemption claimed by the appellee under the Act of 1854.

Not only does the Act of 1866 subject to taxation all property in the state, and repeal in general terms all exemptions heretofore granted, but the Act of 1870, ch. 862, provides that all and any provision contained in the charter, or supplements thereto, of any railroad company, whereby its stock or property is exempted from taxation, be and the same is hereby repealed; and by the 2d section, such stock and property is subjected to taxation for state, county, and municipal purposes, in the same manner as the stock and property of other corporations.

The intention of the legislature to subject all property in the state to taxation, and to repeal all exemptions granted to railroad companies, is thus expressed in language plain and unambiguous, and the effect and operation of these acts can admit of but one construction.

The provisions of these acts are repugnant to, and inconsistent with, the exemption from taxation granted to the appellee by the Act of 1854; and as these several acts cannot stand together, the former must be construed as a repeal of the particular act, under which the immunity now claimed by the appellee is derived.

But admitting the legislature had the power under section 47, article 3, of the Constitution, to repeal the exemption granted to the appellee; and that the acts referred to operated as a repeal of such exemption, it is contended, that the tax imposed by the Act of 1872, ch. 234, on the gross receipts of the company, is in conflict with Article 15 of the Bill of Rights, which declares, —

“That every person in the state, or person holding property therein, ought to contribute his proportion of public taxes for the support of the government, according to his actual worth in real or personal property.”

In the case of *The State v. The Cumberland & Pennsylvania Railroad Company*, 40 Md. 22, it was held that the restriction imposed by this article of the Bill of Rights was intended to prevent an arbitrary taxation of property according to kind and quality, without regard to value, and that under it all taxation laid on property must be uniform and equal. Giving full force to the construction thus placed upon the Bill of Rights, it is sufficient to say there is nothing in the record before us to show that the tax imposed by the Act of 1872 is unequal or unjust, or that it subjects in any manner the property of the appellee to taxation, not equally borne by other property in the state.

Being of opinion that the tax imposed by the Act of 1872 upon the gross receipts of the company is a valid tax, it is unnecessary to decide whether the exemption of the shares of stock exempted also every species of property belonging to the appellee. In regard to this question we are not to be understood as expressing any opinion.

The court erred, therefore, in granting the first and second prayers of the appellee, and in refusing the first and second prayers of the appellant. The several propositions presented by the other prayers of the appellant it becomes unnecessary for us to consider.

Judgment reversed, and new trial awarded.

SUPREME COURT OF MAINE.

(To appear in 66 Me.)

LOAN MADE ON SUNDAY.

MEADER v. WHITE.

A loan of money made on the Lord's day is void.
Whether the promise to repay be in writing, verbal, or implied, it cannot be enforced.

ASSUMPSIT on account annexed, originally tried before a trial justice and defended by an account in set-off, and plea of non-assumpsit. The trial justice gave judgment for the plaintiff for \$9 and costs; and the defendant appealed.

By agreement of the parties the case is submitted to the law court on the statement that the matter of one item only shall be presented to the law court; that on one Sunday in April, 1872, at four o'clock in the afternoon, the defendant went to the house of his brother-in-law, the plaintiff, in Dexter, four miles from his own house, and said to the plaintiff that he wanted to borrow of him the sum of \$9, and promised to repay it the next fall. Thereupon the plaintiff let the defendant have the sum of \$9.

If the action is maintainable for the nine dollars the defendant is to be defaulted for that sum and interest from the date of the writ and for costs; otherwise the plaintiff is to be nonsuit and the defendant to have costs.

V. A. Sprague & M. Sprague, for the plaintiff, contended in substance that one who loans money without interest on Sunday to relieve want, necessity, distress, violates no moral law, nor the statute which forbids travelling or doing "any work labor, or business on that day except works of necessity or charity;" that either the defendant represented truly that he was in want, or untruly: if truly, neither was violating the law; if untruly, he should not take advantage of his own wrong, not participated in by the plaintiff.

In the course of the argument under various views, the counsel cited and commented upon the following cases: *Cratty v. Bangor*, 57 Maine, 423; *Bailey v. Blanchard*, 62 Maine, 168; *Garrick v. Wason*, 4 Ohio St. R. 566; *Whitcomb v. Gilmore*, 35 Vt. 297; *State v. Goff*, 20 Ark. 289; *Jones v. Anderson*, 10 Allen, 18; *Commonwealth v. Sampson*, 97 Mass. 407; *McGrath v. Merwin*, 112 Mass. 467; *Phil. R. R. Co. v. Phil. Towboat Co.* 23 Howard U. S. 209; *McClary v. Lowell*, 44 Vt. 116; *Hearne v. Nichols*, 1 Salk. 289; *Flagg v. Millbury*, 4 Cush. 243; *Adams v. Gray*, 19 Vt. 358.

The counsel closed with an appeal to the court, that if the points noticed were of no avail, that the wisdom of the court would discover a remedy which would combine law and justice, and give to the plaintiff the money which the defendant was so unjustly endeavoring to withhold.

J. Crosby, for the defendant. The contract being made on Sunday is illegal. It has no element of religion, necessity or charity.

Melior est conditio defendentis. *Plaisted v. Palmer*, 63 Maine, 576, and cases there cited.

APPLETON, C. J. The defendant borrowed of the plaintiff nine dollars on the Lord's day. Had he given his note for this sum, its collection could not have been enforced because of the statute forbidding secular business on that day. Whether the promise to repay is evidenced by a written memorandum, or by a verbal promise, or rests upon an implied one, the same result must follow. The contract was illegal because made on a day when the making of contracts is forbidden, and the plaintiff cannot claim through an act prohibited by the statute. *Finn v. Donahue*, 35 Conn. 216; *Plaisted v. Palmer*, 63 Maine, 576.

The moral obligation to repay money loaned is the same, whether the loan be made on one day or on another. It is an unfortunate condition of the law when the violator of its commands is rewarded by it for such violation. The defendant and the plaintiff are alike guilty of a violation of law: the former in soliciting a loan, the latter in yielding to such solicitation. Both are liable to the penalty provided by the statute. But the defendant, while guilty with the plaintiff and equally amenable to the penalties provided by the statute, is rewarded for his wrong doing by the refusal of the law to aid in the enforcement of a debt justly due. He is absolved from an indebtedness created at his own instance; while his associate in guilt, who yielded to his wishes, is liable to a double penalty, that inflicted by the law, and that arising from the non-payment of money loaned in addition to the sorrows of a regretful conscience.

Juvenal indignantly says: "*Multi committunt eadem, diverso crimina fato. Ille crucem pretium sceleris tulit, hic diadema.*" So, now, of two

criminals guilty of the same offence, one is punished and the other rewarded by the law, which creates the offence. *Plaintiff nonsuit.*

DICKERSON, VIRGIN, and PETERS, JJ., concurred
WALTON, J., concurred in the result.

WING v. WING.

SLANDER. — "A. STOLE WINDOWS."

The words, "A. B. stole windows from C. D.'s house," are not of themselves, in their ordinary and popular sense, actionable, as imputing either a charge of larceny or an act of malicious mischief upon real estate.

CASE FOR SLANDER. The declaration alleges in the usual form that the defendant uttered and published the following false, scandalous, and malicious words of and concerning the plaintiff, to wit, that "Almon Wing stole windows from Benjamin Jordan's house," by means of which false and scandalous words the plaintiff has been exposed to a prosecution for stealing, and has suffered great anxiety of mind. The defendant demurred generally to the declaration. The presiding justice, the demurrer being joined, sustained it; and the demurrer being sustained the plaintiff excepted.

I. W. Davis, for the plaintiff.

L. Barker & L. A. Barker, for the defendant.

PETERS, J. The words alleged to be actionable are: "Almon Wing stole windows from Benjamin Jordan's house." There being no special averments, it is to be presumed that the words were used in their ordinary and popular sense. The plaintiff impliedly so avers, there being no express averment to the contrary. That is one rule of construction. Another rule is, that all the words spoken, so far as necessary to ascertain the meaning of the person who utters them, must be considered together. The sense of actionable words may be so far qualified by subsequent words spoken in the same connection that the words taken together are not actionable. Therefore, if a person is charged with stealing, under such circumstances as show that a felony was not capable of being committed, the words are not to be regarded as actionable. Among the illustrations of this rule is the familiar one found in the books, and stated in *Bac. Abr.* (Title Slander), in this way: "If J. S. say to J. N., 'Thou art a thief, and hast stolen my trees,' no action lies; it appearing from the latter words, that the whole words only import a charge of a trespass." *Allen v. Hillman*, 12 Pick. 101; *Dunnell v. Fiske*, 11 Met. 551; *Edgerly v. Swain*, 32 N. H. 478. See, also, numerous cases cited in note to the case of *Booker v. Coffin*, 1 Amer. Lead. Cases, 76.

Tested by these rules, our opinion is, that the words uttered by the defendant do not impute the crime of larceny, but amount to an accusation of only a trespass upon real estate. *Demurrer sustained.*

SUPREME COURT OF THE UNITED STATES.

[MARCH, 1877.]

MUNICIPAL BONDS. — FAILURE TO COMPLY WITH STATUTORY PROVISIONS, ETC.

McCLURE v. TOWNSHIP OF OXFORD.

Any failure to comply with the provisions of law touching the issue of a municipal bond will render it invalid. And this rule is to be applied to detached coupons which refer on their face to the bonds.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

A municipality must have legislative authority to subscribe to the capital stock of a bridge company before its officers can bind the body politic to the payment of bonds purporting to be issued on that account. Municipal officers cannot rightfully dispense with any of the essential forms of proceeding which the legislature has prescribed for the purpose of investing them with power to act in the matter of such a subscription. If they do, the bonds they issue will be invalid in the hands of all that cannot claim protection as *bond fide* holders.

To be a *bond fide* holder one must be himself a purchaser for value without notice, or the successor of one who was. Every man is chargeable with notice of that which the law requires him to know, and of that which, after being put upon inquiry, he might have ascertained by the exercise of reasonable diligence. Every dealer in municipal bonds, which upon their face refer to the statute under which they were issued, is bound to take notice of the statute and of all its requirements.

The statute under which the bonds now in question were issued, and which is referred to in the bonds, though passed and approved March 1, 1872, was not by its terms to go into effect until after its publication in the Kansas Weekly Commonwealth. Of this every purchaser of the bonds had notice, because it was part of the statute he was bound to take notice of. A purchaser would, therefore, be put upon inquiry as to the time of the publication, and by reasonable diligence could have ascertained that this did not take place until March 21. This being the case, the law charges him with knowledge that the statute did not go into effect until that date.

The statute further provided that no bonds could be issued under its authority until the question of their issue had been submitted to the legal voters of the town at an election, of which thirty days' notice had been given, and at which a majority of the votes should be in favor of the measure. These bonds bore date April 15, 1872, and, pursuant to the express requirements of the act, contained a statement of the purpose for which they were issued, a reference to the act under which they were issued, and the result of the vote of the inhabitants on the question of their issuance, which is stated to have been taken April 8, 1872. No valid notice of an election could be given until the act went into effect, because until then no officer of the township had authority to designate

the time or place of holding it. These bonds, therefore, carried upon their face unmistakable evidence that the forms of the law under which they purported to have been issued had not been complied with, because thirty days had not elapsed between the time the law took effect and the date of the election. If a purchaser may be, as he sometimes is, protected by false recitals in municipal bonds, the municipality ought to have the benefit of those that are true.

This suit was brought upon coupons detached from the bonds purchased by the plaintiff in error before maturity, but upon their face they refer to the bonds, and purport to be for the semi-annual interest accruing thereon. This puts the purchaser upon inquiry for the bonds and charges him with notice of all they contain.

This disposes of the case. As the declaration sets out a copy of the bonds with all the recitals, and the recitals show that the bonds were irregularly issued and not binding upon the township, it follows that the declaration does not set forth a good cause of action against the defendant, and that the demurrer was properly sustained. This is in accordance with the decision of the supreme court of Kansas in *George v. Oxford Township*, 16 Kansas, 72. Under these circumstances it is unnecessary to consider any other of the questions which have been certified here.

The judgment is affirmed.

SUPREME COURT OF THE UNITED STATES.

[MARCH, 1877.]

JUDGMENT AS BAR OR ESTOPPEL. — RULE STATED AND EXPOUNDED.

CROMWELL v. COUNTY OF SAC.

1. The difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action, stated. In the former case the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.
2. In an action against a county in Iowa upon certain interest coupons originally attached to bonds issued by the county for the erection of a court-house, it was found and determined that the bonds were void as against the county in the hands of parties who did not acquire them before maturity for value; and, inasmuch as the plaintiff in that action had not proved that he had given such value, it was adjudged that he was not entitled to recover: *Held*, that the judgment did not estop the plaintiff holding other bonds of the same series, and other coupons attached to the same bonds as the coupons in the original action, from showing in a second action against the county that he acquired such other bonds and coupons for value before maturity.

3. The finding in one action that the plaintiff therein is the holder and owner of certain coupons in suit, does not estop the defendant from showing, in another action, that such plaintiff prosecuted the first action for the use and benefit of the plaintiff in the second action. The finding only establishes the fact that such plaintiff held the legal title to the coupons, which was sufficient for the purpose of the action, and was not inconsistent with an equitable and beneficial interest in another.

IN error to the circuit court of the United States for the District of Iowa.

Mr. Justice FIELD delivered the opinion of the court.

This was an action on four bonds of the county of Sac, in the State of Iowa, each for one thousand dollars, and four coupons for interest, attached to them, each for one hundred dollars. The bonds were issued in 1860, and were made payable to bearer, in the city of New York, in the years 1868, 1869, 1870, and 1871 respectively, with annual interest at the rate of ten per cent. a year.

To defeat this action the defendant relied upon the estoppel of a judgment rendered in favor of the county in a prior action brought by one Samuel C. Smith upon certain earlier maturing coupons on the same bonds, accompanied with proof that the plaintiff, Cromwell, was at the time the owner of the coupons in that action, and that the action was prosecuted for his sole use and benefit.

The questions presented for our determination relate to the operation of this judgment as an estoppel against the prosecution of the present action, and the admissibility of the evidence to connect the present plaintiff with the former action as a real party in interest.

In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defences actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defences were not presented in the action and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defences never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defence actually presented in the action, but also as to every ground which might have been presented, is strictly accurate when applied to the demand or claim in controversy. Such demand or claim having passed into judgment cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.

The difference in the operation of a judgment in the two classes of cases mentioned is seen through all the leading adjudications upon the doctrine of estoppel. Thus, in the case of *Outram v. Morewood*, 3 East, 346, the defendants were held estopped from averring title to a mine in an action of trespass for digging out coal from it, because in a previous action for a similar trespass they had set up the same title and it had been determined against them. In commenting upon a decision cited in that case, Lord Ellenborough, in his elaborate opinion, said: "It is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel. The recovery of itself in an action of trespass is only a bar to the future recovery of damages for the same injury, but the estoppel precludes parties and privies from contending to the contrary of that point or matter of fact, which, having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been, on such issue joined, solemnly found against them." And in the case of *Gardner v. Buckbee*, 3 Cowen, 120, it was held by the supreme court of New York, that a verdict and judgment in the marine court of the city of New York upon one of two notes given upon a sale of a vessel, that the sale was fraudulent, the vessel being at the time unseaworthy, were conclusive upon the question of the character of the sale in an action upon the other note between the same parties in the court of common pleas. The rule laid down in the celebrated opinion in the *Case of the Duchess of Kingston* was cited, and followed: "That the judgment of a court of concurrent jurisdiction* directly upon the point is as a plea a bar, or as evidence conclusive between the same parties upon the same matter directly in question in another court."

These cases usually cited in support of the doctrine that the determination of a question directly involved in one action is conclusive as to that question in a second suit between the same parties upon a different cause of action, negative the proposition that the estoppel can extend beyond the point actually litigated and determined. The argument in these cases, that a particular point was necessarily involved in the finding in the original action, proceeded upon the theory that if not thus involved the judgment would be inoperative as an estoppel. In the case of *Miles v. Caldwell*, reported in the 2d of Wallace (page 35), a judgment in ejectment in Missouri, where actions of that kind stand, with respect to the operation of a recovery therein, as a bar or estoppel, in the same position as other actions, was held by this court conclusive, in a subsequent suit in equity between the parties respecting the title, upon the question of the satisfaction of the mortgage under which the plaintiff claimed title to

the premises in the ejectment, and the question as to the fraudulent character of the mortgage under which the defendant claimed, because these questions had been submitted to the jury in that action, and had been passed upon by them. The court held, after full consideration, that in cases of tort, equally as in those arising upon contract, where the form of the issue was so vague as not to show the questions of fact submitted to the jury, it was competent to prove by parol testimony what question or questions of fact were thus submitted and necessarily passed upon by them; and by inevitable implication also held that in the absence of proof in such cases the verdict and judgment were inconclusive, except as to the particular trespass alleged, whatever possible questions might have been raised and determined.

But it is not necessary to take this doctrine as a matter of inference from these cases. The precise point has been adjudged in numerous instances. It was so adjudged by this court in the case of *The Washington, Alexandria & Georgetown Steam Packet Co. v. Sickles*, reported in the 24th of Howard (page 333). In that case an action was brought upon a special parol contract for the use of Sickles's cut-off for saving fuel in the working of steam-engines, by which the plaintiffs, who had a patent for the cut-off, were to attach one of their machines to the engine of the defendants' boat, and were to receive for its use three fourths of the saving of fuel thus produced, the payments to be made from time to time when demanded. To ascertain the saving of fuel an experiment was to be made in a specified manner, and the result taken as the rate of saving during the continuance of the contract. The plaintiffs in their declaration averred that the experiment had been made, the rate of saving ascertained, and that the cut-off had been used on the boat until the commencement of the suit. In a prior action against the same defendant for an instalment due, where the declaration set forth the same contract in two counts, the first of which was similar to the counts in the second action, and also the common counts, the plaintiffs had obtained a verdict and judgment; and it was insisted that the defendant was estopped by the verdict and judgment produced from proving that there was no such contract as that declared upon, or that no saving of fuel had been obtained, or that the experiment was not made pursuant to the contract, or that the verdict was rendered upon all the issues, and not upon the first count specially. The circuit court assented to these views, and excluded the testimony offered by the defendants to prove those facts. But this court reversed the decision, and held that the defendants were not thus estopped.

"The record produced by the plaintiffs," said the court, "showed that the first suit was brought apparently upon the same contract as the second, and that the existence and validity of that contract might have been litigated. But the verdict might have been rendered upon the entire declaration, and without special reference to the first count. It was competent to the defendants to show the state of facts that existed at the trial, with a view to ascertain what was the matter decided upon by the verdict of the jury. It may have been that there was no contest in reference to the fairness of the experiment, or to its sufficiency to ascertain the premium to be paid for the use of the machine at the first trial, or it

may have been that the plaintiffs abandoned their special counts and recovered their verdict upon the general counts. The judgment rendered in that suit, while it remains in force, and for the purpose of maintaining its validity, is conclusive of all the facts properly pleaded by the plaintiffs; but when it is presented as testimony in another suit, the inquiry is competent whether the same issue has been tried and settled by it."

It is not believed that there are any cases going to the extent that because in the prior action a different question from that actually determined might have arisen and been litigated, therefore such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand, although loose remarks looking in that direction may be found in some opinions. On principle a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action.

Various considerations, other than the actual merits, may govern a party in bringing forward grounds of recovery or defence in one action, which may not exist in another action upon a different demand, such as the smallness of the amount or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and his own situation at the time. A party acting upon considerations like these ought not to be precluded from contesting in a subsequent action other demands arising out of the same transaction. A judgment by default only admits for the purpose of the action the legality of the demand or claim in suit; it does not make the allegations of the declaration or complaint evidence in an action upon a different claim. The declaration may contain different statements of the cause of action in different counts. It could hardly be pretended that a judgment by default in such a case would make the several statements evidence in any other proceeding. *Boyleau v. Rutlin*, 2 Excheq. 665, 681, and *Hughes v. Alexander*, 5 Duer, 498.

The case of *Howlett v. Tarte*, 10 C. B. N. S. 813, supports this view. That was an action for rent under a building agreement. The defendant pleaded a subsequent agreement changing the tenancy into one from year to year, and its determination by notice to quit before the time for which the rent sued for was alleged to have accrued. The plaintiff replied that he had recovered a judgment in a former action against the defendant for rent under the same agreement, which had accrued after the alleged determination of the tenancy, in which action the defendant did not set up the defence pleaded in the second action. On demurrer the replication, after full argument, was held bad. In deciding the case Mr. Justice Willes said: "It is quite right that a defendant should be estopped from setting up in the same action a defence which he might have pleaded, but has chosen to let the proper time go by. But nobody ever heard of a defendant being precluded from setting up a defence in a second action because he did not avail himself of the opportunity of setting it up in the first action. . . . I think we should do wrong to favor the introduction of this new device into the law." Mr. Justice Byles said: "It is plain that there is no authority for saying that the defendant is precluded from setting up this defence." Mr. Justice Keating said: "This is an

attempt on the part of the plaintiff to extend the doctrine of estoppel far beyond what any of the authorities warrant."

The language of the vice-chancellor, in the case of *Henderson v. Henderson*, 3 Hare, 100, 115, is sometimes cited as expressing a different opinion, but upon examining the facts of that case it will appear that the language used in no respect conflicts with the doctrine we have stated. In that case a bill had been filed in the supreme court of Newfoundland by the next of kin of an intestate against A. and others for an account of an estate and of certain partnership transactions. A decree was rendered against A., upon which the next of kin brought actions in England. A. then filed a bill there against the next of kin and personal representative of the intestate, stating that the intestate's estate was indebted to him, and alleging various errors and irregularities in the proceedings in the supreme court of the island, and praying that the estate of the intestate might be administered, the partnership accounts taken, and the amount of the debt due to him ascertained and paid. A demurrer to the bill was allowed for want of equity, on the ground that the whole of the matters were in question between the parties, and might properly have been the subject of adjudication in the suit before that court. It was with reference to the necessity of having the subject of particular litigation as a whole at once before the court and not by piecemeal, that the vice-chancellor said: "In trying this question, I believe I state the rule of court correctly, that when a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the court requires the parties to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation, in respect of matter which might have been brought forward as part of the subject in controversy, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of the case. The plea of *res adjudicata* applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion, and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

There is nothing in this language, applied to the facts of the case, which gives support to the doctrine that whenever in one action a party might have brought forward a particular ground of recovery or defence, and neglected to do so, he is in a subsequent suit between the same parties upon a different cause of action precluded from availing himself of such ground.

If now we consider the main question presented for our determination by the light of the views thus expressed and the authorities cited, its solution will not be difficult. It appears from the findings in the original action of Smith that the county of Sac, by a vote of its people, authorized the issue of bonds to the amount of ten thousand dollars for the erection of a court-house; that bonds to that amount were issued by the county judge and were delivered to one Meserey, with whom he had made a contract for the erection of the court-house; that immediately upon receipt of the bonds, the contractor gave one of them as a gratuity to the

county judge; and that the court-house was never constructed by the contractor, or by any other person pursuant to the contract. It also appears that the plaintiff had become before their maturity the holder of twenty-five coupons which had been attached to the bonds; but there was no finding that he had ever given any value for them. The court below held upon these findings that the bonds were void as against the county, and gave judgment accordingly. The case coming here on writ of error, this court held that the facts disclosed by the findings were sufficient evidence of fraud and illegality in the inception of the bonds as to call upon the holder to show that he had given value for the coupons, and not having done so, the judgment was affirmed. Reading the record of the lower court by the opinion and judgment of this court, it must be considered that the matters adjudged in that case were these: that the bonds were void as against the county in the hands of parties who did not acquire them before maturity and give value for them; and that the plaintiff, not having proved that he gave such value, was not entitled to recover upon the coupons. Whatever illegality or fraud there was in the issue and delivery to the contractor of the bonds, affected equally the coupons for interest attached to them. The finding and judgment upon the invalidity of the bonds as against the county must be held to estop the plaintiff here from averring to the contrary. But as the bonds were negotiable instruments, and their issue was authorized by a vote of the county, and they recite on their face a compliance with the law providing for their issue, they would be held as valid obligations against the county in the hands of a *bond fide* holder taking them for value before maturity, according to repeated decisions of this court upon the character of such obligations. If, therefore, the plaintiff received the bond and coupons in suit before maturity for value, as he offered to prove, he should have been permitted to show that fact. There was nothing adjudged in the former action in the finding that the plaintiff had not made such proof in that case which can preclude the present plaintiff from making such proof here. The fact that a party may not have shown that he gave value for one bond or coupon is not even presumptive, much less conclusive, evidence that he may not have given value for another and different bond or coupon. The exclusion of the evidence offered by the plaintiff was erroneous, and for the ruling of the court in that respect the judgment must be reversed and a new trial had.

Upon the second question presented we think the court below ruled correctly. Evidence showing that the action of Smith was brought for the sole use and benefit of the present plaintiff was, in our judgment, admissible. The finding that Smith was the holder and owner of the coupons in suit went only to this extent, that he held the legal title to them, which was sufficient for the purpose of the action, and was not inconsistent with an equitable and beneficial interest in another.

Judgment reversed and cause remanded for a new trial.

SUPREME COURT COMMISSION OF OHIO.

(To appear in 28 Ohio St.)

EJECTION OF PERSON FROM STREET CAR.

HEALEY v. THE CITY PASSENGER RAILROAD CO.

1. Whether it is due and proper care to attempt to remove a person from a street railroad car, while the same is in motion, is a question of fact for the jury, and not of law for the court.
2. If the driver of such car has authority to collect fare, and to put a person off for its non-payment, his master will be liable, if injury results from excessive force and violence in so doing, or if, as driver, he is guilty of carelessness or negligence in keeping the car in motion, by reason of which the person is run over and injured.
3. Where the evidence of the plaintiff tends to show want of care on the part of the driver of a street car in keeping the car in motion, while he is putting a person off for non-payment of fare, by reason of which the person is run over by the car and injured, it is error, in such case, to instruct the jury that the liability of the railroad company depends solely on the question whether the driver acted within the scope of his employment in attempting to collect fare, and in putting the person off for refusal to pay.
4. Where the injury complained of results from want of care in the driver in running of the car, and not from the force and violence used in ejecting a person from the car, the company would be liable, whether the driver had or had not authority to collect fare.

ERROR to the superior court of Cincinnati.

The facts of this case will be found in the opinion of the court.

Thomas Powell, for plaintiff in error. 1. The driver had control over the front platform of the car, was acting within the scope of his authority, and the company is responsible for his acts while he is on the platform in the discharge of his duty. *Drew v. Sixth Avenue R. R. Co.* 26 N. Y. 49; 8 Keyes, 428; 17 N. Y. 362; 8 Bosw. 305; 88 N. Y. 181, affirming 10 Bosw. 260.

2. The court erred in qualifying the first instruction asked by plaintiff and in giving the charge as modified, because it misled the jury. *Walker v. Stetson*, 14 Ohio St. 89; *Bain v. Wilson*, 10 Ohio St. 14; *Little Miami R. R. Co. v. Wetmore*, 19 Ohio St. 134; *P., Ft. W. & C. R. R. Co. v. Slusser*, *Ib.* 161.

If the act of the driver was wilful or malicious the company is liable. *A. & G. W. R. R. Co. v. Dunn*, 19 Ohio St. 170; *Hopkins v. A. & St. L. R. R.* 36 N. H. 9; 8 Bosw. 305; 22 N. Y. 361; 17 N. Y. 362; 1 East, 106; 1 Hill, 480; 7 Com. B. (N. S.) 290; 54 Pa. St. 315; 19 Ohio St. 11; 42 Pa. St. 365; 3 Cush. 300; 4 Gray, 465.

3. The court erred in refusing to give the second instruction to the jury asked by plaintiff. 19 Ohio St. 153; 21 Ohio St. 524; 70 Pa. St. 119; 21 How. 202; 62 Ill. 238.

4. The court erred in refusing to give the third instruction asked by the plaintiff. The qualification misled the jury. 10 Ohio St. 14; 14 Ohio St. 89; 107 Mass. 108.

E. A. Ferguson, for defendant in error, claimed there was no error in qualifying the first and third instructions asked by plaintiff, nor in refus-

ing the second. *Little Miami R. R. Co. v. Wetmore*, 19 Ohio St. 131; *Passenger R. R. Co. v. Young*, 21 Ohio St. 518; *Steamboat Ocean v. Marshall*, 11 Ohio St. 382.

JOHNSON, J. This action is brought by the plaintiff, to recover damages, alleged to have been caused by the want of proper care and skill of the agents and servants of the defendant, a company owning and operating a street railroad in Cincinnati. It is averred that the plaintiff was a passenger to be carried from Fifth Street near Vine to the corner of Fourth and Main streets, for a certain hire or reward, and while being so carried, the defendant, by its servants and agents, so carelessly, negligently, and unskilfully conducted the running of the car, that, without fault on his part, the plaintiff was thrown from the car to the ground, and the wheels of the car ran over and injured him.

The answer denies all the allegations of the petition, except that the defendant is an incorporated company, and the owner of the railroad.

The case was tried to a jury at special term, and verdict rendered for defendant. On motion for a new trial, which was overruled, a bill of exceptions was taken, and the case went to the general term on error, when the judgment was affirmed.

Did the superior court err in affirming this judgment? The bill of exceptions shows several errors were relied on below, part only of which need be noticed.

The plaintiff, to maintain the issue on his part, offered evidence tending to show that the plaintiff was twelve years old, and was, at the time engaged in selling newspapers along the streets of Cincinnati; that it was customary for the newsboys to get on the cars to sell papers, and ride free of charge; that on the morning when this injury happened, he had got on the front platform of a car going east along Fifth Street, and was about to enter the car, when the driver demanded his fare; that plaintiff told him he had none; that the driver then ordered him off, and then shoved or threw him off, while the horses were going in a trot, and the wheels passed over him and caused the injuries complained of.

The defendant's evidence tended to show that the driver did not demand fare of the plaintiff, or throw or shove him off; that the boy got on the front platform where there was no one but the driver, went to the door and called "Papers," then returned to the steps, suspended himself by the iron rod, and in some way unknown to the driver, while he was engaged in driving, and without his fault, the boy fell off and was run over, before it was known by the driver, or the conductor, who was on the rear platform, and that they knew nothing of the boy's presence until after he was hurt.

Counsel for plaintiff requested the following charges to the jury:—

"If the jury believe, from the testimony, that the plaintiff, James Healey, got upon the street car of the defendant for the purpose of selling newspapers, and after he was on the front platform of the car where the driver was, and was about to enter the car without paying his fare, and that the car driver used excessive force and violence to put him off the car, or throw him off while the car was in motion, in such case the defendant would be liable for an injury to the plaintiff which was the result of such force and violence."

The court overruled and refused to give the said instruction, as written, to the jury, to which overruling and refusal the plaintiff made his exception.

The court qualified said instruction, and gave the same to the jury, as follows:—

“If the jury believe, from the testimony, that the plaintiff, James Healey, got upon the street car of the defendant for the purpose of selling newspapers, and after he was on the front platform of the car where the driver was, and was about to enter the car without paying his fare, and that the car driver used excessive force and violence to push him off the car, for that reason, or threw him off while the car was in motion, in such case the defendant would be liable for an injury to the plaintiff which was the result of such force and violence, provided the collection of the fare by the driver was part of his duty.”

To which qualification, by adding the words “for that reason,” after the word “car,” and the words “provided the collection of fare by the driver was part of his duty,” at the close of the charge, the plaintiff made his exception, and excepted to the charge as given.

Plaintiff further prayed the court to instruct the jury as follows:—

“If the jury find from the testimony that the car driver had no right to demand the fare, yet from a wrong judgment on his part, he thought he had the right to demand fare from those on the front platform, and they further find from the testimony that he did demand the fare from James Healey, who refused, and then, without stopping the car, threw him off, and the injury complained of resulted therefrom; in such case the defendant would be held liable for the injury caused to plaintiff by such act of the driver of the car,” which the court overruled and refused, and the plaintiff thereupon made his exception to the overruling and refusing by the court to give said instruction to said jury.

The plaintiff further prayed the court to instruct the said jury as follows:—

“That the employment of a driver of a street car, when he occupies the front platform, and the conductor of the car occupies the rear platform, implies that the driver has an authority over the persons who are found on his platform at the front of the car, and his master would be liable for any injury to them caused by his wrongful act, default, or carelessness, provided the persons injured were not equally in fault;” which instruction the court overruled and refused to give, as asked, to which overruling and refusing the plaintiff made his exception. Thereupon the court qualified said instruction, and gave the same to the jury, as follows:—

“That the employment of a driver of a street car, where he occupies the front platform, and the conductor of the car occupies the rear platform, implies that the driver has an authority over the persons who are found on his platform at the front of the car, so far as the purposes of his employment are to be effected, and his master would be liable for any injury to them caused by his wrongful act, default, or carelessness, provided the person injured were not equally in fault, and provided such wrongful act, default, or carelessness occurs in the course and within the scope of his employment;” to which qualifications, by adding the words

"so far as the purposes of his employment are to be effected," after the word car, and the words, "and provided such wrongful act, default, or carelessness occurs in the course and within the scope of his employment," at the close of said charge, the plaintiff made his exception, and excepted to the said charge as given.

It is now well settled that, to make the master responsible for the act of the servant, it must be an act done in the course of his employment; that is, under the express or implied authority of his master; and that, beyond the scope of such authority, the servant is as much a stranger to his master as any third person, and the act of the servant, not done in the execution of the service for which he was engaged, cannot be regarded as the act of the master.

If the act be one of omission or commission, whether negligent, fraudulent, deceitful, or wrongful, if it be done in the course of his employment, his master is responsible in a civil action to third persons.

In such cases, the maxim *respondeat superior* applies.

The rule of law thus stated is plain, but the difficulty arises in its application to the cases as they arise.

In making such application, it may safely be assumed that the servant is invested with authority to use the necessary means to the performance of the duties assigned to him, and that the character of the means will vary according to the nature of the duty to be performed, and the attending circumstances.

Did the court err in the application of these principles? The petition charged that plaintiff was injured through the carelessness and negligence of the servants of the company, in the running of their cars, by which he was thrown to and upon the ground, while the car was in motion, and run over by the wheels of the car. The proof of plaintiff tended to show that the driver assumed to demand and collect fare, and upon non-payment, the plaintiff was shoved off, while the car was in motion, and run over.

This evidence was directly controverted, and each party was entitled to instructions of law to the jury, based on what the evidence tended to prove.

The liability of the defendant depended on the acts or omissions of the driver alone. It is not claimed that any other servant of the railroad company knew of the matter until it was over, or that the company was otherwise responsible than for his acts.

The first charge, as modified and given to the jury under exceptions by plaintiff, was doubtless an attempt to apply the rule in *Little Miami R. R. Co. v. Wetmore*, 19 Ohio St. 110, in which it was held that, for wrongful acts done by a servant, not within the scope of his employment, his master was not liable. If the plaintiff's right of action rested solely on what the driver did, *while acting as a conductor*, that is, if the injury arose from putting the plaintiff off for non-payment of fare, then it might have been proper to have given the charge as modified; but such was not the aspect of the case, as shown by the pleadings or presented by plaintiff's proofs.

By these, the plaintiff's case, if he made out one, and that was for the jury, rested on the claim that there was negligence in running the cars while he was being thrown or shoved off, by reason of which he was run over and injured.

The jury were told, that if it was within the scope of the driver's employment to collect fare, and, for its non-payment, he had used excessive force and violence to put the plaintiff off, or threw him off while the cars were in motion, the defendant was liable. This charge made the liability of the company to turn solely on the question of whether the collection of fare was part of his duty.

The converse of the proposition is, that if the collection of fare was no part of the driver's duty, then the company was not liable, although he was thrown or shoved off for non-payment of fare while the car was in motion. The charge was, in effect, that however careless or negligent it may have been to thus eject a person while the car was in motion, yet, as a rule of law, there could be no recovery, unless it was part of the driver's duty to collect fare.

The charge, as given, took from the jury an important inquiry: that is, was the driver guilty of negligence and carelessness, *as driver*, in keeping the car in motion while the plaintiff was being ejected? Even though it may have been entirely proper to have put the plaintiff off the car, the manner of doing it, and circumstances under which it was done, if injury resulted therefrom, should have been left to the jury. If the collection of fare was not within the scope of his employment, and yet he assumed it, from whatever motive, that did not exonerate the company from injuries resulting from his acts as driver, within the scope of his authority as such.

The authority, or absence of authority to collect fare, could not relieve the driver from want of proper care in the movements of the car, and within the scope of his employment.

If, in addition to his duties as driver, he was charged with the further duty of collecting fares at the front platform, and, for non-payment, might eject a passenger, it was a question of fact for the jury, to determine whether it was careless or negligent to do so while the car was in motion; but in the charge as given, the jury might well understand that notwithstanding there was negligence in so doing, yet there was no liability if it was no part of the driver's duty to collect fare.

In *Lovett v. Salem & South Danvers R. R. Co.* 5 Allen, 557, it was recognized as a proper duty, while ejecting an intruder, to first stop the car or slacken its speed to such a degree that, using due care, he might leave safely.

In *Murphy v. Union R. R. Co.* 118 Mass. 228, it was held: "If a passenger on a horse railroad is so intoxicated as to be offensive to the other passengers, the conductor has the right to remove him from the car; and whether it is due care, and a proper exercise of this right, for the conductor to attempt to remove him while the car is in motion, is a question of fact for the jury, and not of law for the court."

In *Wilton v. Middlesex R. R. Co.* 107 Mass. 108, it was held: "That if a person riding with due care on the platform of a horse car, not as a passenger for hire, but by invitation of the driver, and without collusion with him to defraud the corporation, is injured through his negligence in driving the car, the corporation is liable;" although it appeared that the driver had no authority to permit persons to occupy the platform, unless such authority be implied by the fact of his employment as driver;

and although it also appeared that it was in violation of his instructions to permit persons to ride without payment of fare.

We do not undertake to say that the charges should have been given as requested, but we are clearly of opinion that, as modified, the first charge was misleading, and the refusal to give the second request may have tended further to the same end.

While the application of the general rules to particular cases is always attended with difficulty, yet, in this, as in most others, a few plain and simple principles underlie defendant's accountability.

If, in the exercise of his employment, whatever its scope may have been, whether simply as driver in charge of the front platform of the car, or as both driver and conductor, he exercised due care and diligence, and injury resulted without his fault, in either or both capacities, his master is not liable. If, on the contrary, the injury resulted from the want of such care and diligence as driver, or from both, as conductor and driver combined, his master is liable.

In the aspect of the case as presented by the plaintiff's evidence, and without expressing any opinion as to the weight of that evidence, we think there was error, not in refusing the first and second charges as requested, but in giving the first as modified. It took from the jury an important question of fact, and made the liability of the company to depend wholly on the fact whether it was part of his duty to collect fare.

The judgment of the court below is reversed, and cause remanded.

SUPREME COURT OF THE UNITED STATES.

[APRIL, 1877.]

CHECK. — ACCEPTANCE OF BY BANK. — PAYMENT UPON UNAUTHORIZED INDORSEMENT.

FIRST NATIONAL BANK OF WASHINGTON v. WHITMAN.

The payee of a check which has not been accepted by the bank on which it is drawn cannot maintain an action upon it against the bank. Until acceptance there is no privity of contract between the payee and the bank.

So held where a check of the treasurer of the United States upon a depositing bank had been paid upon an unauthorized indorsement of the name of the payee, and where the action was brought by the true owner of the check.

It does not alter the rule that there has been a settlement of accounts between the treasurer and the bank, and the check in question was allowed in the account to the credit of the bank, upon the supposition that it had been properly paid. Such erroneous allowance does not affect the real state of the accounts, but is open to correction when discovered.

Payment to a stranger upon an unauthorized indorsement does not operate as an acceptance of the check, so as to authorize an action by the real owner to recover its amount as upon an accepted check.

IN error to the supreme court of the District of Columbia.

Mr. Justice HUNT delivered the opinion of the court.

This action is brought against the First National Bank of Washington to recover the amount of a draft drawn upon it by Mr. Spinner, treasurer of the United States, for \$3,414, dated March 9, 1867. The draft is in this form, viz. : —

Draft No. 9,243 on war warrant No. 915.

\$3,414.

TREASURY OF THE UNITED STATES,

WASHINGTON, *March 9, 1867.*

Pay to the order of Mrs. E. S. Kimbro, three thousand three hundred and fourteen dollars. No. 9,243. Registered March 9, 1867.

Issued on requisition No. ——. \$3,414.

S. B. COLBY,

Register of the Treasury.

F. E. SPINNER,

Treasurer of the United States.

To the First National Bank of Washington, D. C.

It was indorsed in the name of Mrs. Kimbro without authority, and the amount of it was paid by the bank to an unauthorized holder. It appears from the testimony of Mr. Tayler, first comptroller of the treasury, that the funds of the government deposited by the treasurer in a national bank are treated by the government, for the purposes of keeping accounts, as in the treasurer's own charge and custody; that they are charged to him, and that payments made are credited to him, and that he is chargeable precisely as if the funds had been in his own office, and that he had power to make the draft in question.

We may, therefore, simplify the case by eliminating from its consideration all reference to the United States, and consider the transaction as between Mr. Spinner, as an individual, and the bank, as his depository, and Mrs. Kimbro, as the payee of his check.

The question is this: Can the payee of a check, whose indorsement has been forged or made without authority, and when payment has been made by the bank on which it was drawn upon such unauthorized indorsement, maintain a suit against the bank to recover the amount of the check? We think it is clear, both upon principle and authority, that the payee of a check unaccepted cannot maintain an action upon it against the bank on which it is drawn. The careful and well-reasoned opinion of Mr. Justice Davis, in delivering the judgment of this court in *The Bank of the Republic v. Millard*, 10 Wall. 152, leaves little to add upon this subject by way of illustration or authority. In that case a paymaster of the army made his check on the Bank of the Republic to the order of Captain Millard for \$859, due to him for arrears of pay as an officer of the army. The bank paid the amount of the check upon a forged indorsement of Millard's name. Recovering the check and exposing the forgery, Millard demanded payment to himself, and upon refusal brought his action against the bank. This court held that the action could not be maintained, upon the principle that there was no privity between the bank and Millard. The bank's contract was with the paymaster only, and to him only was its duty. It received no money from Millard. It never promised Millard to

pay him any money. It had no money belonging to him. It received money from the paymaster upon an agreement that it would return it to him when called for by him in person, or that it would pay it upon his checks. But it made no such agreement, or any agreement, with Millard. For a failure of duty in this respect it was responsible to the paymaster, with whom it made the contract, and to no one else. If the check was not paid the arrears of pay to Millard were not paid, and his claim upon the government or the paymaster was not impaired by the giving of the check, which being presented in due time was not paid. He was still entitled to demand his arrears.

The case of Millard is a perfect and complete authority upon the question stated. See, also, *Artuer v. Bank*, 46 N. Y. 82.

Nor is this principle confined to checks or bills. Thus, in *Ashley v. Dixon*, 48 N. Y. 430, it was held that if A. be under a contract to sell property to B., and C. persuade A. to sell the property to him, no action lies by B. against C. There is no privity of contract between C. and B., but the remedy of the latter is against A. only.

It is not to be doubted, however, that it is within the power of the bank to render itself liable to the holder and payee of the check. This it may do by a formal acceptance written upon the check, in which case it stands to the holder in the position of a drawer and acceptor of a bill of exchange. *Merchants' Bank v. State Bank*, 10 Wall. 604; *Espy v. Bank of Cincinnati*, 18 Wall. 604.

It may accomplish the same result by writing upon it the word "good," or any similar words which indicate a statement by it that the drawer has funds in a bank applicable to the payment of the check and that it will so apply them. *Cook v. State Bank of Boston*, 52 N. Y. 401. And such certificate, it is said, discharges the drawer. As to him it amounts to a payment. *Bank v. Leach*, 52 N. Y. 350; *Meads v. Merchants' Bank*, 25 N. Y. 143; 9 Met. R. 311; 2 Duer, 121. Whether this certificate be obtained by the drawer before the check is delivered, and is thus made an inducement to the payee to receive the same, or whether it is made upon the application of the payee for his security, is of no importance. It is a contract recognized by the law, valid in its character, which essentially changes the position of the parties. The privity of contract with the drawee, which before pertained to the drawer alone, is now imparted to the payee, and the duty which before existed only to the drawer, now exists to the payee.

It is said that this fact of a contract between the payee and drawee exists in the present case. The testimony of Mr. Arnold is referred to, to the effect that in April, 1867, the bank made its weekly statement to Mr. Spinner of deposits received and payments made, returning the draft of Mrs. Kimbro as paid on the 22d of that month, and that in the statement the amount of the draft was entered to the credit of the bank.

There is no suggestion in the evidence that either the bank or Mr. Spinner knew that the indorsement of the payee was unauthorized. The bank, we assume, would not knowingly subject itself to the dangers and liabilities resulting from making payment to one not authorized to receive it. We assume, also, as we are bound in justice to it to do, that it would not ask Mr. Spinner to give credit for a payment that it knew to

have been illegally made, and that it would not attempt to deceive him into the belief that a pretended indorsement was a real one. It comes to this, then, that upon a settlement of accounts between them a credit was by mistake allowed to the bank to which it was not entitled. The law is that neither party is to be benefited or to be injured by the mistake. The bank must refund the amount, by handing over the sum or by crediting the same to Mr. Spinner in his next account. Mistakes in bank accounts are not uncommon. They occur both by unauthorized or pretended payments, as well as by the omission to give credit for sums deposited. When discovered the mistake must be rectified, and an ordinary writing up of a bank book with a return of vouchers or a statement of accounts precludes no one from ascertaining the truth and claiming its benefit. Story Eq. Plead. §§ 799, 800, 801; Story Eq. Jur. §§ 523, 527; *Buchlin v. Chaplin*, 1 Lans. 443; *Bruen v. Hone*, 2 Barb. 586; *Bullock v. Boyd*, 2 Ed. R. 293. We cannot perceive that such a mistaken recognition of the validity of the payment of this check can create an additional or different contract between the bank and the owner of the draft.

It is further contended that such an acceptance of the check as creates a privity between the payee and the bank is established by the payment of the amount of this check in the manner described. This argument is based upon the erroneous assumption that the bank has paid this check. If this were true it would have discharged all of its duty, and there would be an end of the claim against it. The bank supposed that it paid the check, but this was an error. The money it paid was upon a pretended and not a real indorsement of the name of the payee. The real indorsement of the payee was as necessary to a valid payment as the real signature of the drawee, and in law the check remains unpaid. Its pretended payment did not diminish the funds of the drawer in the bank, or put money in the pocket of the person entitled to the payment. The state of the account was the same after the pretended payment as it was before.

We cannot recognize the argument, that a payment of the amount of a check or sight draft under such circumstances amounts to an acceptance, creating a privity of contract with the real owner. It is difficult to construe a payment as an acceptance under any circumstances. The two things are essentially different. One is a promise to perform an act, the other an actual performance. A banker or an individual may be ready to make actual payment of a check or draft when presented, while unwilling to make a promise to pay at a future time. Many, on the other hand, are more ready to promise to pay than to meet the promise when required. The difference between the transactions is essential and inherent.

Without discussing the other questions argued, we are of the opinion, for the reasons given, that the plaintiff below was not entitled to recover.

The judgment is reversed, and the case is remanded for a new trial, or for such further proceedings as the parties may be advised to take.

CIRCUIT COURT OF THE UNITED STATES FOR THE EAST-
ERN DISTRICT OF VIRGINIA.

[MAY, 1877.]

NUMERICAL SYMBOL MAY BE USED AS A TRADE-MARK.

KINNEY v. ALLEN & CO.

The numerical symbol $\frac{1}{2}$, printed in large, bold, red characters, in a certain form and style, had been used since 1873 by the complainant as one of his trade-marks on the packages and boxes of certain classes of cigarettes manufactured by him, and was registered in the United States Patent Office in June, 1875. This symbol was originally employed to indicate the idea that the cigarettes were composed of two kinds of tobacco in the proportion of half and half; but except so far as it indicates this idea, which it does not really *express*, it is a merely arbitrary device.

On a bill brought to enjoin against another's use of this symbol: *Held*, that the complainant had not a right to the exclusive use of the numerical character $\frac{1}{2}$, written in any ordinary manner; but that he had a right to the exclusive use of it in the particular form, size, color, and style in which he had used and registered it.

THIS was a suit to restrain the infringement of a trade-mark. The trade-mark consisted of a representation of one-half, and had been duly registered in the Patent Office of the United States, pursuant to the Revised Statutes. The following is a fac-simile of it as shown by the proofs:—

$\frac{1}{2}$

Other facts are set forth in the opinion.

Cox & Cox, for complainant. The defences relied upon are as follows: (1.) That the symbol is not a trade-mark because it is composed of numerals. (2.) That the symbol is not a trade-mark because it is descriptive. (3.) That, even if the symbol is a trade-mark, it has not been infringed, because the respondent's labels as wholes are entirely unlike complainants.

1. A numeral or numerals may be used as a trade-mark.

That a word or words may be employed as a trade-mark has long been settled law. It is submitted that it necessarily follows that a numeral or numerals may be. A word is the expression of a concept or idea. A numeral is also the expression of a concept or idea. The word "ten" and the numeral 10 are essentially the same as vehicles of a concept. They are unlike only as "idem" and "same" are unlike. "1805 Brandy" would not be sustained for the same reason that "EIGHTEEN HUNDRED AND FIVE BRANDY" would not; because both would necessarily express a fact concerning the date of production of the article. But "FIVE FIFTY-FIVE BRANDY" would be good in law, and for the same reason "555 Brandy" would, it is submitted, be open to no objection. And, it may be added, if a manufacturer used "555" for one quality, "666" for another, and "777" for a third, they would all be equally valid as arbitrary expressions of an idea. As far as any principle is involved, therefore, there is no difference between numerals and words.

The adjudged cases are to the effect that numerals may be employed as trade-marks. *Gillott v. Esterbrook*, 47 Barb. 455; *Dawes & Fanning Case*, Dec. Com. Pat. 1872.

2. The symbol as used by the complainant is not descriptive.

The evidence shows that it has been used upon cigarettes made of two and three kinds of tobacco. Its office is the same as that of any other brand or trade-mark. The complainant manufactures a "ST. JAMES," which is made of one kind or mixture of tobacco; a "CAPORAL," which is made of another kind or mixture; an "ALEXIS" which is made of another kind or mixture, and so on. One of the incidental qualities of each of these different designations is that it signifies a particular kind of tobacco or mixture. "ST. JAMES" has been applied to a cigarette of perique; "CAPORAL" to a cigarette of perique and Virginia, and "ALEXIS" to a cigarette of other tobaccos. Because these terms have been so applied, and have, when used on cigarettes of Kinney's manufacture, a distinct and indisputable reference to the ingredients of which the cigarettes are composed, they are none the less valid trade-marks. Because "ST. JAMES" has been invariably and continuously used on perique cigarettes by Kinney, and, as used by him, is synonymous with perique, it by no means follows that others may use "ST. JAMES" upon perique cigarettes. In brief, "ST. JAMES" does not mean simply perique cigarettes, but *perique cigarettes made by Kinney*, and any use of the word "ST. JAMES" in connection with cigarettes is a representation that they are (1.) made of perique, and (2.) made by Kinney.

If, then, it be conceded that the symbol of one half, as used by the complainant, has been invariably applied to cigarettes made of mixed tobacco, it is not a sequitur that the respondents have a right to use it. In contemplation of law, upon such an assumption, the particular symbol means (1.) cigarettes made of mixed tobacco, and (2.) cigarettes made by Kinney.

It is confidently submitted, therefore, that any defence based on the circumstance that the mark may have been used only upon cigarettes made of mixed tobacco is without force.

The material inquiry then becomes, Is the red symbol $\frac{1}{2}$, arranged as shown, descriptive?

The adjudged cases establish that a word is not a trade-mark, on account of its being descriptive, only when it is such by reason of its *etymological relation to the article in connection with which it is employed*. To be descriptive it must point directly to some quality or property of the goods. It must be an intelligible statement of a fact. It must communicate from its etymological nature, not by association or inferentially, some truth concerning the goods. Either this or it must have come to be descriptive by public use as a term of art or trade. Thus "Navy" as applied to tobacco, and "Pig" as applied to iron, are descriptive terms by reason of common use. Both were once valid trade-marks, and yet both were originally used just as the symbol $\frac{1}{2}$ is alleged to have been used by the complainant. The originator of pig iron made an article of particular properties. The term was arbitrarily applied, but fell into general use, and so became descriptive. Perhaps a century hence a red one-half will be equally descriptive; but to-day it is just where the term "Pig" was when it was first used by its originator and pointed to his production of iron.

The symbol, as used by the complainant, has *in itself no meaning whatever.*

What does it mean to the court when it is observed on a package of cigarettes? It is absolutely meaningless. The sole conception is that it is a symbol denoting one-half. Nothing beyond this is communicated to the mind. Everything else is conjecture. It may relate to price, or to ingredients, or to size, or to quality. It may mean that half the cigarettes are of one kind and half of another, or that half-rate tobacco is used. It may mean any or all of these, and meaning any or all it is not descriptive.

It signifies a fact only at most when there is one half of something, but what that something may be it does not and cannot denote. As a consequence, it is not in any right sense descriptive.

It is not a synonym of "mixed," and can only become such by common use. It may mean mixed on Kinney's goods, just as "ST. JAMES" means perique, but it does not, *apart from Kinney's use of it*, mean anything. It is, in brief, *an arbitrary sign or mark used to denote a particular class of goods made by a particular person. It is a trade-mark.*

3. But it is urged that even if the symbol is a trade-mark, it has not been infringed, because the respondents' labels as wholes are entirely unlike complainants. There is no contention on the part of the complainant, that the labels as wholes are so nearly similar as to be likely to be mistaken. The case is purely a *trade-mark case*, the infringement consisting in the application of that which complainant insists is used to distinguish his goods as a specific mark or symbol.

In respect of infringement, it is said by the supreme court of the United States, in the case of *The Canal Company v. Clark*, 13 Wall. 311: "The first appropriator of a name or device, pointing to his ownership, or which by being associated with articles of trade has acquired an understood reference to the originator or manufacturer of the articles, is injured when another adopts the same mark or device for similar articles; because such adoption is in effect representing falsely that the production of the latter are those of the former."

The language of the statute is: "Any person who shall reproduce, counterfeit, copy, or imitate any recorded trade-mark, and AFFIX THE SAME to goods of substantially the same descriptive properties, shall be liable to an action," &c.

There can be no doubt, therefore, that the question of whether the labels are generally similar is immaterial.

The distinctions of the present case are unquestionably nice, but it is thought that a critical examination must necessarily lead to the conclusion that the law is with the complainant.

John O. Steger, for respondents. The complainant testifies that he has used the figures " $\frac{1}{2}$ " on two brands of his cigarettes, the "ST. JAMES" and the "CAPOBAL," as early as June, 1871, and the fact is not denied. He further testifies that he so used them as a *trade-mark*. This is denied, and is clearly disproved by the evidence. The complainant commenced using the Turkish Cap and the " $\frac{1}{2}$ " on the same day for a particular purpose, and that was, to mark a particular kind of goods. That the "ST. JAMES" and the "ST. JAMES $\frac{1}{2}$ " were com-

menced about the same time, but the "ST. JAMES" was the first. The "ST. JAMES" cigarettes were made of perique tobacco, and the "ST. JAMES $\frac{1}{2}$ " were made of *one half* perique and one half Turkish. Upon each of these brands the complainant affixed a label containing the words "ST. JAMES" and his name, and, also, his unquestioned trade-mark, the Turkish Cap. If the " $\frac{1}{2}$ " was designed by him to designate *the origin or ownership* of the article, what reason was there for affixing it upon a label, which already had two trade-marks upon it, and also his own name? On the other hand, if he designed to make another kind of cigarette, composed one half of perique and the other half of some other kind of tobacco, it would be appropriate, convenient, and economical to use the "ST. JAMES" label, and distinguish the difference in the cigarettes by the figures " $\frac{1}{2}$," meaning thereby that the cigarettes thus marked contained only $\frac{1}{2}$ perique tobacco. The "CAPORAL" cigarettes were made of Turkish and Virginia tobacco; the "CAPORAL" $\frac{1}{2}$ were made of Turkish, Virginia, and perique, in what proportions we are not informed, but it is fair to presume that they contained $\frac{1}{2}$ of Turkish and Virginia and $\frac{1}{2}$ of perique, as "CAPORAL" was of Turkish and Virginia. Every box and package of cigarettes made by the complainant informed the trade that the Turkish Cap was his trade-mark, and his show-cards and price lists which were distributed to dealers showed the composition of his various brands of cigarettes, and, in some instances, informed them that the "Cap" was his trade-mark, and he never, in any way whatever, informed the trade that the " $\frac{1}{2}$ " was claimed by him as a trade-mark, although he had already sued several persons for violating it. And it was the understanding of the trade that he affixed the $\frac{1}{2}$ on the St. James and Caporal simply to designate that the cigarettes thus marked *contained only one half of the same tobacco* as the cigarettes marked "ST. JAMES" and "CAPORAL." The complainant never used the $\frac{1}{2}$ except upon cigarettes made of *mixed tobaccos*. He made other cigarettes of mixed tobaccos, for which he had different names and different labels, upon which he did not put the $\frac{1}{2}$, for the simple reason that it was not necessary to do so to distinguish them. But when he used the *same labels* for different kinds of cigarettes it was necessary to distinguish them.

The defendant did not originally intend to use the " $\frac{1}{2}$ " as a trade-mark, but only to distinguish one brand of "ST. JAMES" from another, and one brand of "CAPORAL" from another. If he did, how can it be explained that although the $\frac{1}{2}$ was imitated and used by other manufacturers for four years past, he did not register it sooner or take any steps to inform the trade that it was his trade-mark, as he did with regard to the Turkish Cap and his other trade-marks. Nor will it avail him to urge, that on the 8th of June, 1875, he certainly did avow that intention, and from that time he is entitled to it as a trade-mark. For at that time, according to his own deposition, it was used by other manufacturers to distinguish their various brands of cigarettes, whom he had sued or was then suing for its infringement, and it had become known to the trade as a mark indicating the *composition* or kind of cigarette, and not as indicating *origin or ownership*. Even if the figures $\frac{1}{2}$ could be exclusively appropriated as a trade-mark, the complainant has not so used them, and cannot now claim them as such.

In the leading case of *Amoskeag Manuf. Co. v. Spear*, 2 Sanf. (S. C.) 599, it was held "that no one has an exclusive right to the use of any words, letters, figures, or symbols, which have no relation to *origin or ownership* of the goods, but are only meant to indicate their name or quality. No one can appropriate a sign or symbol which, from the nature of the fact which it is used to signify, others may employ with equal truth, and therefore have an equal right to employ for the same purpose." This case has been recognized and followed in numerous cases ever since the decision was rendered in 1849. It was expressly approved in 13 Wallace, 311; *Burko v. Cassin*, 45 Cal. 467; *Town v. Stetson*, 5 Abb. Pr. R. N. S. 218; *Stokes v. Landgraff*, 17 Barb. 608; *Caswell v. Davis*, 58 N. Y. Rep. 223; *Taylor v. Gillies*, 59 N. Y. Rep. 331; *Wolfe v. Goulard*, 18 How. Pr. Rep. 64; *Choynski v. Cohen*, 39 Cal. 501; *Falkenburg v. Lucy*, 35 Cal. 52; *Canal Co. v. Clark*, 13 Wallace, 311; *Glen Hall Co. v. Hall*, 6 Lansing N. Y. 158; *Corwin v. Daly*, 7 Bosworth N. Y. 158; *Boardman v. Mer. Brit. Co.* 35 Conn. R. 402; *Gillott v. Esterbrook*, 47 Barb. 455. The bill should be dismissed with costs.

The opinion of the court was delivered by

HUGHES, J. The complainant is a manufacturer in New York of cigarettes of several varieties, which are in very popular use. On certain classes of the packages and boxes in which he makes them up for market he places, amongst other trade-marks, an Eastern fez surrounded by rays of light; and, also, the numerical symbol $\frac{1}{2}$, printed in bold characters, in red color, with the bar between the two figures oblique and nearly upright; with the figure 1 elevated on the left; with the figure 2 depressed on the right; the symbol as a whole being of such size that the circumference of a circle having a radius of five eighths of an inch will just include all of its points. This character of $\frac{1}{2}$ as thus described has been used by the complainant on certain of his cigarettes since 1873, and he applied for its registration in the Patent Office of the United States in May, 1875.

Shortly before this last named date, that is to say, in April, 1875, the respondents began to manufacture cigarettes in Richmond similar to those of the complainant, and to put some classes of them up for market in packages and boxes similar to those used by the complainant; and to stamp some of the boxes and packages, amongst other devices, with this same numerical character $\frac{1}{2}$, in broad, scarlet, red color, with the dividing bar oblique and nearly upright, and of size identical with the same character as used by the complainant.

The latter complains that this is an infringement of his right to the exclusive use of this trade-mark, and files his bill praying for a perpetual injunction forbidding the use of it by the respondents.

It would seem that the original idea of the complainant in using this character $\frac{1}{2}$, on certain of his wares, was to indicate that the cigarettes stamped with it were made up of two kinds of tobacco, in the proportion of half-and-half. The numerical character does not *express* such an idea; it is not the term which a person accustomed to the use of accurate language would employ for the purpose of expressing it; but yet it must be admitted that it does in some sort *indicate* the idea, and is not an absolutely arbitrary symbol. It is only because of the fact that the char-

acter does *indicate* the idea of half-and-half, but does not *express* it, that any confusion attends this case. If the use by the complainant of the numerical character $\frac{1}{2}$ was absolutely arbitrary, there could be no question of his exclusive right to use it stamped in any form upon his goods. But where, on the other hand, a character or word is the one in general use for describing the quality or kind of goods on which it is placed, the books are full of authorities showing that such character or word ordinarily used cannot be appropriated by any one manufacturer; and that the most he can acquire by long usage, or by statutory registration, is the right of using the character or word printed or painted in some special form not in ordinary use. The cases reported on this head are so numerous and emphatic that it is needless to cite them.

There are, therefore, but two questions arising in the present case as to this numerical character $\frac{1}{2}$.

1. The first is, — its use by the complainant being in a critical sense merely arbitrary, as only *indicating* but not *expressing* the idea of half-and-half; but not absolutely arbitrary in a popular sense, — whether or not complainant has a right to an injunction prohibiting the use by others of the character *in any form* on wares similar to his own. On the general principle that exclusive privilege, in prejudice of general right, ought not to be upheld in cases of nicety and doubt, I think it most proper not to grant a general injunction.

2. The next question is, whether the complainant has a right to the exclusive use of this trade-mark *in the form, size, color, and style*, in which he has used it upon his wares since 1873, and in which he registered it in 1875. Upon the authority of cases numerous reported, and upon principles well established, I decide that he has such a right, and will so decree; and will insert in the decree an imprint of the character $\frac{1}{2}$ in the form, size, color, and style, in which an exclusive use upon his cigarettes is affirmed to the complainant.

SUPREME COURT COMMISSION OF OHIO.

(To appear in 28 Ohio St.)

BILLS AND NOTES. — PRINCIPAL AND SURETY. — EVIDENCE. —
SURETY, ETC.

OLDHAM v. BROOM.

1. The right of contribution among co-sureties is not founded in contract, and does not depend on the form of the instrument nor the position of the names of the obligors therein, but is the result of the application of general principles of equity, and depends on the actual relation they sustain to the instrument and to each other.
2. In an action for contribution, and in the absence of any contract in writing fixing such relation and liability between accommodation parties to a note, parol evidence is admissible to show the real nature of the transaction.
3. As between accommodation makers of a promissory note, the presumption is that

they are co-sureties, and as such liable to each other to contribute; but this presumption may be rebutted by parol proof showing that the one last signing did so as the surety for the prior makers, and not as a co-surety with the prior surety.

4. Where a joint note is signed by the principal and by one as his surety, and is intrusted by the surety to the principal without limit on his authority, such surety thereby impliedly authorizes the principal to obtain such additional sureties or guarantors as may be required to make the paper available for the purposes intended by the original makers, and the sureties or guarantors so obtained may stipulate the terms of their liability, as between themselves and prior parties.
5. One who thus signs such note, at the request of the principal debtor, to enable him to use it as intended, without the knowledge of the prior surety, and without any agreement or understanding with him to the contrary, may stipulate with the principal debtor and make it a condition of his signing that he signs as surety of the prior parties, and not as co-surety with the prior surety.
6. Such stipulation need not be in writing, and parol evidence is admissible to show an express contract to that effect, or facts and circumstances that will raise an implied contract.
7. Declarations of such party, made to the principal debtor at the time he executes and delivers the instrument, as to the terms and conditions on which he becomes liable, are, in connection with other testimony, admissible as part of the *res gestæ*, tending to show an agreement, express or implied, as to the extent of such liability.

THIS was an action in the court below by Daniel Broom against Oldham, to compel contribution, on the ground that they were co-sureties of one Hugh Broom, on a note joint in form, executed by all, as makers, to secure to one Mathews money owing by Hugh, for whose accommodation the plaintiff and defendant became liable as co-sureties of Hugh, who is insolvent.

The petition further states that after the maturity and non-payment Mathews recovered a judgment against all the makers, and, to satisfy the same, sold plaintiff's property; and the prayer is that he recover of defendant one half the amount.

Oldham admits signing the note, but denies he is a co-surety, and avers that he is only liable for Hugh and Daniel Broom.

Upon this issue the verdict was for the plaintiff for one half the amount paid by plaintiff. A motion for a new trial was overruled, and judgment rendered on the verdict. A bill of exceptions was taken, and, on error to the district court, the judgment was affirmed.

The errors complained of are:—

1. That the court erred in its charge to the jury.
2. And in refusing to charge as requested by the defendant.

The bill of exceptions contains the charge given, as well as that refused, with a statement of the nature of the evidence offered in the case. It is as follows:—

"Be it remembered that on the trial of this cause in the court of common pleas within and for the county of Guernsey, Ohio, at the April term thereof A. D. 1872, evidence had been given tending to show that plaintiff signed the note upon which judgment was obtained, and upon which the payment alleged in the petition was made, before defendant signed the same; that neither was present when the other signed the note; that defendant stated to Hugh Broom that he would not sign the note without a written promise from plaintiff to indemnify him against its payment; that Hugh Broom presented the note to defendant; that the note had been before signed by Hugh Broom and plaintiff; that at

the same time Hugh Broom gave defendant a written promise from plaintiff to indemnify defendant against its payment in case he signed the note; that there was no other agreement or understanding between *plaintiff and defendant* in relation to the note or the defendant's signing thereof; that upon the faith of said written promise of indemnity defendant signed the note; that defendant stated at the time he signed the note that he did sign the same as surety for Hugh Broom and plaintiff; that defendant intended to and did sign the same as surety for Hugh Broom and plaintiff; that this note was executed and given in renewal of a note upon which Hugh Broom was principal, and upon which plaintiff and defendant were co-sureties; that at the time the second note was signed by plaintiff, he did not recollect who was on the first note, or whether any person except himself; did not know the time defendant signed the renewal note, and that Hugh Broom alone was present at the time defendant signed the renewal note. The defendant asks the court to instruct the jury upon the proposition herein indicated, among such other instructions as the court may deem necessary to be given in charge upon the other propositions in the case, as follows: A surety who signs the note after another surety has signed may so stipulate at the time of signing as not to be liable to contribution with the other sureties who have signed before him, and the form of doing this is not important, nor is it important that this should appear upon the note; and where one signs as co-surety after other sureties have signed and without privity with them, it is not important that they should be made aware of the terms upon which subsequent sureties become holden; should you find that the written request to sign the note and save harmless, claimed by defendant to have been made to him by plaintiff, was not made, you will then make the additional inquiries, did the defendant at the time he signed the note intend to and did he sign the same as surety for Hugh Broom and plaintiff, and not merely as co-surety with plaintiff, and did he so sign the same after plaintiff had signed, and in plaintiff's absence and without any previous agreement or understanding with plaintiff to sign as co-surety; and should you as to these inquiries find, *either by the form of the writing, that is, by the note itself, or from the nature of the transaction, as that defendant, at the time he signed the note, said or in any way indicated that he intended and did sign the same as surety for Hugh Broom and plaintiff, and not as co-surety with plaintiff*, and should you find that he so signed the note after the same had been signed by plaintiff, and in his absence, and without any agreement or understanding with plaintiff to sign as co-surety, your verdict will be for defendant; which instructions the court refused to give to the jury, but the court did charge the jury as follows: 'The plaintiff avers that on the 1st day of August, 1868, himself and defendant jointly with Hugh Broom executed their promissory note to E. W. Mathews for \$700, payable four months after date; that said note was given for money borrowed of E. W. Mathews by Hugh Broom for his sole use and benefit; that the plaintiff and defendant were sureties for Hugh Broom on the said obligation; that at the maturity of said note Hugh Broom failed to pay it and plaintiff was compelled to pay and did pay, in discharge of said obligation, on the 15th day of May, 1871, the sum of \$828.15, the whole amount of said obligation, with

interest and costs; and he now seeks to recover in this action of the defendant, his alleged co-surety, one half of said sum, \$411.57, with interest from said 15th of May, 1871. The defendant by his answer expressly admits the execution of the note by Hugh Broom, plaintiff, and defendant, for the amount, and dated and payable as stated in the petition; and he also admits, because he does not deny, that the money for which the note was given was borrowed by Hugh Broom for his sole use and benefit, and that the plaintiff has been compelled to pay in discharge thereof the amount stated in the petition and as therein specified. The defendant, however, denies that he executed said note as co-surety with Daniel Broom; on the contrary, he avers that he signed the same as surety for both Hugh and Daniel Broom. The issue then presented by these pleadings to the jury for their deliberation is, did the defendant execute this note as surety for Hugh Broom with the plaintiff, as alleged by him, or did the defendant execute the note as surety for Daniel and Hugh? The burden of proof to establish the fact that the defendant and plaintiff executed the note in question to E. W. Mathews as sureties for Hugh Broom is on the plaintiff, and he must satisfy you of the truth of this proposition by the testimony, or the verdict must be for the defendant. It is, however, conceded by counsel in argument that the testimony in this case shows that the note in question was executed as a renewal of a former note executed by the same parties to E. W. Mathews for money borrowed of him by Hugh Broom for his sole use; that, on the original note, Daniel Broom and Marling Oldham were sureties thereon for Hugh Broom; that some time after this note became due it was taken up and the loan renewed by the giving of the note described in the petition. It is claimed on behalf of the plaintiff that it is shown by the testimony that the renewal was effected by Hugh Broom, who procured the signatures of the plaintiff and defendant in the same manner as his sureties to the original note. On the contrary, it is claimed on behalf of the defendant to be established by the testimony that, after the first note became due, he refused to renew the note as surety for Hugh Broom, with plaintiff as co-surety, but that defendant was induced to execute said note by the request of Daniel Broom and as surety for him as well as for Hugh Broom; that the request of the plaintiff upon which the defendant executed said obligation was in writing signed by the plaintiff, and was a request by plaintiff to defendant that he execute said note, and a promise to save him harmless from loss that might arise therefrom; that this paper, executed by the plaintiff, was presented by Hugh at the time of execution of the note; that the defendant, at the time of the execution of the note, declared that he signed the same as surety for both Hugh and Daniel Broom. *This written request is the only arrangement claimed by the defendant to have been made by him with the plaintiff in regard to the execution of the note, and the important questions in this case, and upon which the verdict of the jury must depend, are, did the plaintiff execute the written request which the defendant avers was delivered to him at the time of the execution of the note by Hugh Broom, and was the defendant induced to sign the note in question by virtue of said written instrument thus executed by the plaintiff?* The burden as to both of these propositions is upon the defendant; and he must satisfy your

minds by a preponderance of testimony of the truth of both the above propositions, or your verdict must be for plaintiff, and for one half of the amount paid by him in discharge of said obligation, with interest from the time of payment, May 15, 1871, to first day of this term. If, however, the jury are satisfied by the testimony that Daniel Broom signed the written instrument to Marling Oldham, requesting him to become surety on the paper in question, and that the defendant executed the note in accordance with said request, then your verdict must be for defendant. The verdict, if for defendant, will simply find an issue for defendant; if for plaintiff, must find an issue for plaintiff, and assess, as amount due, the defendant's *pro rata* share of the obligation paid by plaintiff, with interest to the first day of this term.'"

John Ferguson, for plaintiff in error, cited *Keith v. Goodwin*, 31 Vt. 268; *Redfield & Bigelow*, 597; 14 Ves. 160; 10 Pick. 121, as to the effect of Daniel Broom's acts. And 3 Ohio St. 418; 10 Ib. 283; 15 Ib. 515; 31 Vt. 268; 14 Ves. 160, on the question as to whether it may be shown by parol evidence what position and liability Oldham intended to, and did take, upon the second note.

H. Skinner, for defendant in error, on the admission of parol evidence, cited *Norton v. Coons*, 2 Seld. 23; *Harris v. Warner*, 13 Wend. 400; *Hogg v. Smith*, 1 Taunt. 347; *Thompson v. Ketchum*, 8 Johns. 148; *Hall v. Newcomb*, 7 Hill, 416.

JOHNSON, J. The note was in form the joint obligation of all the makers. There was nothing to indicate that either was a surety. *Prima facie*, all were principals.

The pleadings admit that Daniel Broom and plaintiff in error were accommodation makers, and that Hugh Broom was the principal debtor.

The question in issue was whether Daniel Broom and Oldham were co-sureties of Hugh, or whether Oldham was the surety of both the prior makers.

They had been co-sureties on a former note, in renewal of which this was delivered to Mathews.

It was signed by Hugh and Daniel, and in that condition was presented by Hugh to Oldham (with whom there appears to have been no understanding that he should sign), with a request that he execute it. Without his signature, it was in complete form for delivery to Mathews, if acceptable to him. The defendant offered evidence tending to show that he refused to sign without an indemnity from Daniel, and thereupon Hugh presented a writing purporting to be such indemnity, and on the faith of which Oldham signed, stating at the time that he signed as surety for both, and intended to obligate himself as such, and not as co-surety with Daniel Broom. There was no communication with Daniel, or agreement or understanding with him or Hugh, other than the one just stated.

The errors complained of are:—

1. The court charged the jury that, as this written indemnity was the only arrangement *between plaintiff and defendant* respecting this note, the verdict of the jury must depend on whether this writing was executed by plaintiff, and whether the note was executed on the faith of it.

2. The court refused to charge that if the jury found the indemnity was not in fact executed by plaintiff, still they should go farther and look to

the real nature of the transaction, and ascertain if at the time the defendant signed he intended to bind himself as a co-surety with plaintiff, or as surety for both the prior parties.

The charge given, as well as the one refused, rests on the theory that the defence depended on the validity of this paper purporting to have been executed by Daniel Broom, promising to indemnify Oldham in case he became a surety.

It took from the jury all other evidence on the issue, and made the case to depend on the genuine character of this contract of indemnity.

The jury were told that if Daniel Broom had not executed this paper the verdict must be for the plaintiff, whatever may have been the real nature of the transaction, as disclosed by the other evidence.

The charge excluded all other facts and circumstances tending to support the issue presented by defendant, and made the verdict depend on the execution or non-execution of this paper.

This view logically led the court to refuse to charge that the jury might look beyond this paper and determine the issue from the actual relation of the parties as shown by the other evidence.

The right of contribution among sureties is not founded in contract, but is the result of principles of equity on the ground of equality of burdens and benefits.

For this reason, where several parties by the same or by distinct instruments become sureties for the payment of a sum of money, and one pays more than his share, he may compel contribution from the others as co-sureties. *Craythorne v. Swinburne*, 14 Ves. 164; *Dering v. Winchelsea*, 2 B. & P. 270 (1 Cox, 318).

Courts of law took jurisdiction of actions for contribution, on the ground that, as equity and good conscience demanded that as among co-sureties there should be equality of burdens, there was an *implied assumpsit* which would support an action at law. *De Colyer on Guar. & Sureties*, 336-340; *Camp v. Bostwick*, 20 Ohio St. 387; 8 Am. Law Reg. 449-456; 13 Ib. 529, 536.

The plaintiff's right of recovery does not rest on anything in the form or terms of the promissory note, for, looking to that alone, they are joint makers, and *primd facie* principals. If the fact appears that some of the parties are sureties of the principal debtor, then *primd facie* the law implies an obligation to contribute.

In *Longly v. Griggs*, 10 Pick. 121, a note was executed by A., B., and C., the last two as sureties. On the back of the note D. indorsed the words, "I consider myself holden as guarantor of this note," and signed the same. It was held that D. might thus limit his undertaking, and that B. and C. could not compel him to contribute.

So in the well considered case of *Keith v. Goodwin*, 31 Vt. 268, there was a note signed by seven persons, without anything to designate who were principals and who were sureties. Below these names the plaintiff and others signed the following guaranty: "For value received we guaranty the payment of the above note." The defendant, who was one of the seven makers, though apparently a principal maker, was in fact a surety. It was held that the plaintiff was surety for all the makers of the note jointly, and not a co-surety with the defendant. It is said in that

case that there was nothing on the face of the note to indicate that the makers were anything but joint principals, and the defendant having signed the note and intrusted it to others with authority to procure additional names, it was giving them authority to represent the defendant, and, by presenting the note for additional names, a virtual representation was made that the defendant was a joint principal. It was further held that a person may, at the time of signing, stipulate with the person presenting the note as to the extent and character of his liability.

We are of opinion, also, that where, as in this case, there is nothing in the form of the contract to indicate who are principals and who are sureties, the court may look to the *nature of the transaction*, to determine not only who are principals and who are sureties, but also, in actions like the present, to determine the liabilities of the parties as between themselves.

This is not parol evidence contradicting a written contract. The action is not *on the note*, nor, in the present case, on any agreement or understanding between the plaintiff and defendant. If Oldham was, in fact, a co-surety for the principal debtor, plaintiff would have a right of action, upon making payment, without any arrangement and understanding with Oldham. If he did not know that he had a co-surety, he might compel contribution on discovering that fact. The implied assumption, or liability to contribute, does not depend on the existence of a contract or arrangement between the several sureties, but on the fact that they are each the sureties for the same debt or obligation.

The form of the note, the position of the parties to it, and the *prima facie* character of the paper, and the order in which they sign it, determine the liability of the obligors to the obligee; and parol evidence is inadmissible to vary or contradict the written contract.

Where, however, the question is one of contribution, and the nature of the transaction between the obligors shows they, or some of them, are sureties of others, the form of the note is no barrier to parol evidence of the actual relation of these obligors to each other.

In case of two accommodation indorsers of a note, if they jointly indorse for the principal, and either pays, he may have contribution of the other; but if they, without any communication or understanding with each other, successively indorse, and the last indorser pays, he can recover the whole amount of the prior indorser; but if the first indorser pays the note, he cannot have contribution of the last. In the first case there is contribution, because they are co-sureties, and this is made to appear by parol. In the second the whole amount is recovered, because it is the case of second indorser or holder (who, as indorser, has been compelled to take up the note) against a prior indorser, on the faith of whose indorsement he is supposed to have become liable.

In the third case the first indorser cannot have recourse on the second, if he takes up the note, because he must look to the prior obligors.

This was the case of *McDonald v. Magruder*, 8 Pet. 474, and is placed on the ground that the legal liability of the first indorser to the second was fixed by the form of their signing, and could not be changed "otherwise than by an express or implied contract between the parties;" and as there was no such contract, the general rule of commercial law prevailed.

It is said by C. J. Marshall, "Magruder and McDonald might have become joint indorsers, and that would have been a joint promise, in which event each would be liable for a moiety; but as they indorsed separately and successively, and there was no contract or understanding between them which might vary their legal liabilities, they remain in full force as successive indorsers."

Where different persons successively indorse accommodation paper, before it goes into circulation, for the purpose of obtaining a discount for one of the parties, their liability to each other depends on the circumstances of the case. In an action by the holder, who was last indorser, and had taken the paper up, parol evidence was admissible to show the circumstances under which the bill was signed. *Pilkin v. Flanagan*, 23 Vt. 160.

In *Barry v. Ransom*, 21 N. Y. 465, it is said that "an agreement between co-sureties, as to their liability among themselves, in a manner different from what the law would prescribe where there was no such agreement, would not contradict any of the terms of the bond."

So, parol evidence of extrinsic facts is admissible to rebut a presumption, arising from the face of an instrument, that all are principals. *Harris v. Brooks*, 21 Pick. 195.

In *Keith v. Goodwin*, *supra*, it is said, "If one sign a note as surety, and intrust it to his principal, he thereby gives the latter implied authority to obtain either additional sureties or guarantors indefinitely, until the note is fairly launched in the market; and one who signs as such additional surety may at the time so stipulate as not to be liable with other sureties, but as surety of the prior parties."

In New York it is held that parol proof of extrinsic facts, to show who are principals and who are sureties, or of a contract distinct from the note, between the sureties themselves, is competent; but that conversations and declarations of intention, at the time of signing, are not admissible. *Barry v. Ransom*, 21 N. Y. 465; *Harris v. Warner*, 13 Wend. 400; *Norton v. Coon*, 2 Seld. 33.

Judge Gray places the case last cited on the ground that such declarations are inadmissible, because they would contradict the implied liability created by signing as surety; while Gardner, J., places it on the ground that the evidence was insufficient; and the other judges concurred in the judgment, but whether on the ground stated by Gray or Gardner, does not appear. While in *Wright v. Garlinghouse*, a later case by the same court, it is said the *prima facie* character of the paper, and the liability which it imposes, are of no consequence, where it can be shown there was an agreement on the subject.

The case of *Norton v. Coon*, *supra*, would hardly be regarded as authority, even in that state, for the doctrine laid down by Judge Gardner.

In New York, it is said that parol proof is inadmissible to show the intention of a stranger to a note, who indorses his name on the back, that the law makes him an indorser, and his liability cannot be changed by parol; while in Ohio and most other states such evidence is competent. *Champion v. Lathrop*, 13 Ohio, 228; *Robinson v. Abel*, 17 Ohio, 36; *Greenough v. Smeed*, 3 Ohio St. 418; *Seymour v. Mackey*, 15 Ohio St. 515; *Bright v. Carpenter*, 9 Ohio, 139. See, also, in *Kelley v. Few*, 18 Ohio, 441, a case of accommodation parties to a bill.

So the findings of the court, in a former action on the note, that some were principals and some were sureties, did not conclude the parties in a subsequent action for contribution. 26 Ohio St. 100.

Parol evidence of declarations of intention made at the time of signing, before delivery of the paper, are part of the *res gestæ*, admissible to establish an agreement, where they do not contradict the written contract or vary the rights of prior parties. *Bonser v. Rendell*, 31 Ind. 128; *Robinson v. Lyle*, 10 Barb. 512; *Adams v. Flanagan*, 36 Vt. 400; *Apgar v. Hiler*, 4 Zab. 812.

That such declarations are competent in connection with other testimony, as part of the *res gestæ*, going to show a mutual agreement, express or implied, is supported by numerous cases.

The actual relations of the signers to each other and the real nature of the contract between them is the problem to be solved where the paper is silent; and even though the paper describes some as sureties, that is not conclusive, and the real purposes and objects of the paper may be shown. *Adams v. Flanagan*, 36 Vt. 408; *Lathrop v. Wilson*, 30 Vt. 604; *Morris v. Faurat et al.* 21 Ohio St. 155.

Where there is no understanding with prior parties, and nothing in the form of the contract to prevent, and no fraud on the rights of the first signer, we think it is clear that another, who afterward signs as an accommodation party, may stipulate as to the terms of his liability, and that as between him and his co-obligors such terms need not be in writing. We hold further, that where the prior surety signs and intrusts the note in complete form to the principal debtor, without limitation as to his authority, he is competent to accept additional names on such terms as they may agree on, which do not change the obligation of prior parties.

Apply these principles to the case at bar. Daniel Broom signed as surety without any agreement or understanding that Oldham should also sign. The note was complete, and might have been negotiated without further signatures, and he could not have complained. Hugh Broom had authority to negotiate it in that condition, or, if not acceptable to the creditor, to obtain other signatures to make it so, and might therefore accede to conditions on which others were willing to sign.

The evidence tended to show that Oldham refused to sign unless indemnified, and that then Hugh presented such contract of indemnity, purporting to be signed by plaintiff, and on the faith of that writing, and intending to sign as surety for both, he signed the note and delivered it to Hugh, who accepted and negotiated it.

This stipulation was one not in fraud of any right of plaintiff, and if the defendant's proof was satisfactory to the jury, it constituted a contract limiting his liability, as he made that a condition of his becoming liable.

The plaintiff having executed this note jointly with the principal debtor and as his surety, and having in that form intrusted it to his principal to be used, impliedly authorized him to issue it as it was, or to procure such further security as would make it available, and for that purpose to accept such terms as the party signing might prescribe. If those terms were in writing, no one would doubt their force, though not made *with plaintiff*; but it is well settled such an agreement may be by parol.

The evidence tended strongly to show that Oldham did stipulate his

terms, and that Hugh accepted the signature on the conditions prescribed.

If this contract of indemnity was a forgery, but was relied on by Oldham, that fact is a circumstance, "an extrinsic fact," tending to show his intention when he signed the note.

The condition on which he agreed to sign was that the plaintiff should indemnify him. These terms seem to have been satisfactory to Hugh, as he presented a paper purporting to be executed by plaintiff as such indemnity. It was accepted as such, and on the faith of it defendant became a party to the note. It was none the less a contract because the paper he received in execution of its terms proved to be a forgery. The case, as presented to the jury, was made to turn on the genuine character of this paper. If the defence had rested on that, if it had been pleaded as the ground of defence to the action, the view of the court would have been correct; but such was not the issue presented. It was that he signed as surety of both prior makers, and was not a co-surety.

It is said in argument that this paper was a contract of indemnity for defendant's becoming the surety of Hugh Broom, and that his signing made him a co-surety with plaintiff, relying on his indemnity to protect him, and therefore it is inconsistent now to claim he was not such co-surety, but was surety for both.

To this we answer, that although it may have been in form a contract of indemnity, that is to save him harmless if he went on the note, it was in legal effect, as between plaintiff and defendant, an agreement that the plaintiff would pay the note, and would not look to defendant for contribution. If it had been genuine, it would have been a bar to this action. If not genuine, while he could not defeat a recovery on the ground that the plaintiff had bargained away his right of contribution, that did not prevent the defendant proving a contract with the principal debtor limiting his liability, where no right of plaintiff was impaired.

For these reasons we think the district court and the court of common pleas erred.

Judgment reversed and cause remanded.

SUPREME COURT OF MAINE.

(To appear in 66 Me.)

CRIMINAL LAW. — EFFECT OF OMISSION OF SEAL UPON VENIRE. — REQUISITES OF PLEA IN ABATEMENT.

STATE v. FLEMMING.

An indictment found by a grand jury drawn by virtue of venires not having the seal of the court upon them, is illegal and void; and the defect is one which cannot be cured by amendment, or by special act of the legislature.

In a criminal case a plea in abatement is sufficient, if it is free from duplicity and states a valid ground of defence to an indictment in language sufficiently clear not to be misunderstood; the strictest technical accuracy, such as is sometimes required in purely dilatory pleas in civil suits, will not be exacted.

INDICTMENT charging the defendant with being a common seller of intoxicating liquors at Bangor, in the county of Penobscot, on the first day of September, A. D. 1875, and to the time of finding the indictment at the February term, A. D. 1876.

(Signed.) A true bill.

Emore C. Smart, *Foreman*.

The defendant seasonably filed the following plea in abatement: —

“ STATE OF MAINE.

“ Penobscot, Scilicet : Supreme Judicial Court for the State of Maine, and at the February term thereof, in the year of our Lord one thousand eight hundred and seventy-six, for the transaction of criminal business.

“ State of Maine, by indictment against Thomas E. Flemming.

“ And on the sixth day of March in the year of our Lord one thousand eight hundred and seventy-six.

“ And now the said Thomas E. Flemming, in his own proper person, cometh into said court, and having heard the said indictment against him read, saith, that the said State of Maine ought not to further prosecute the said indictment against him, the said Thomas E. Flemming, because, he saith, that Emore C. Smart, of Bangor, in said county of Penobscot, who at said February term of said court did serve and act in finding and returning said indictment into said court at said February term thereof, as one of the grand jurors by whom said indictment at the said term of said court was found and returned into said court at said term thereof, which said indictment so as aforesaid found, was returned into said court as aforesaid, on the eleventh day of February, in the year of our Lord one thousand eight hundred and seventy-six, was not, at the time he so served and acted as aforesaid, and at the time said indictment was found and returned as aforesaid, duly and legally qualified to serve as said grand juror, in this: that said Emore C. Smart was drawn as said grand juror, pursuant to and in obedience to a supposed writ of *venire facias*, which said supposed writ of *venire facias* was issued from said court by Ezra C. Brett, clerk thereof, on the second day of August, in the year of our Lord one thousand eight hundred and seventy-five, and was not at the time it was so issued, nor at the time said Smart was so drawn as said grand juror, under the seal of said court, which said supposed writ of *venire facias*, with the return thereon, said Thomas E. Flemming, here produces now in court, which said supposed writ of *venire facias* is in words and figures as follows, viz.:” [Here follows the *venire* signed by E. C. Brett, clerk,] “with return upon said supposed writ of *venire facias*, in words and figures as follows, to wit:” [Here follows the return signed George A. Bolton, constable, of Bangor.]

“ Without this that said Smart was drawn as said grand juror, pursuant to any *venire*, except said supposed writ of *venire facias*, hereinbefore set forth in this plea.

“ And this the said Thomas E. Flemming is ready to verify.

“ Wherefore the said Thomas E. Flemming prays judgment of said indictment, and that the same may be quashed.

(Signed.)

“ Thomas E. Flemming.

“ State of Maine, Penobscot, ss., Supreme Judicial Court, February
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term, in the year of our Lord one thousand eight hundred and seventy-six, and for the transaction of criminal business : —

“ State of Maine, by indictment against Thomas E. Flemming.

“ Personally appeared this sixth day of March, in the year of our Lord one thousand eight hundred and seventy-six, the beforenamed said Thomas E. Flemming, respondent in said indictment, and made oath that the foregoing plea by him subscribed is true in substance and in fact.

“ Before me, James F. Rawson, *Justice of Peace and Quo.*”

To the plea in abatement, the county attorney demurred generally; the defendant joined. The court sustained the demurrer, adjudged the plea in abatement bad, and ordered judgment for the state, ruling that the defendant could not plead over. The defendant alleged exceptions.

At the same February term, the grand jury returned a large number of other indictments for violations of the liquor law; and when it was discovered that the venirees for the grand jury had been issued without the seal of the court upon them, it was claimed that this defect was fatal to the validity of the indictments; on application, the legislature, then in session, passed an act declaring the indictments valid. A motion was also made to have the venirees amended by affixing a seal to them. These questions were also submitted to the law court.

J. Varney, for the defendant, argued the unconstitutionality of the healing act, and *F. H. Appleton*, on the same side, the sufficiency of the plea in abatement.

Mr. Varney, *inter alia*, said the indictment against the respondent was found February 11, 1876, and on February 22, the legislature on the morning hour of the last day of its session, under a suspension of its rules, after the respondent had been brought to the bar, and without notice to him, and for the purpose of affecting and deciding his case, passed the following act, entitled “ An act to make valid the drawing of grand jurors for the county of Penobscot.”

“ Sec. 1. The venirees issued for draft of grand jurors to serve at the supreme judicial court, within and for the county of Penobscot, for the year of our Lord eighteen hundred and seventy-five and eighteen hundred and seventy-six, are hereby made valid and lawful venirees, notwithstanding the same were issued without the seal of the court thereon; and no act or presentment of said grand jurors shall in any wise be invalidated in law, by reason of any such defect in issuing said venirees.

“ Sec. 2. This act shall take effect when approved.”

This is the act and its title, passed to affect this case and decide it.

A great man of New England, in the discussion of a constitutional question which has been accounted, in all its bearings, the most important one ever mooted in any forum in this country, said, “ Words are things, and things of mighty influence in the discussion of legal and political questions, because a just conclusion is often avoided or a false one reached, by the adroit substitution of one phrase or one word for another.”

And we suggest that instead of the title which the legislature gave to this act, many other titles, much more significant of its intended scope and effect, and much more suggestive of its vicious character might be given it.

For example, would it not be as well to entitle it, an act :—

“To make good a void indictment.”

“To make that a grand jury which was not when it acted.”

“To hold and punish a man criminally arraigned who otherwise could not be held.”

“To deprive a respondent, in a pending criminal case, of a plea.”

“To make good a void writ, because the court which issued it will not.”

“To modify and change, in a particular pending case, the general and standing law of the state.”

“To suspend as to Penobscot County, in the years 1875 and 1876, the law applicable in those years to all other counties, and applicable to that county in all other years.”

“To, by retrospective action, invade the judicial province, and decide a pending case.”

All these things, if the act is applicable to this case, it must do.

Mr. Appleton, in support of the various points of his argument on the plea in abatement, cited: 2 Lil. Ent. 675; 2 Tidd Pr. 714; 5 Bac. Abr. pp. 377 and 380; 2 Hale's P. C. 260, 261, 471; 2 Hawk. P. C. 277, 347, 371, 571, 572; *State v. Lightbody*, 38 Maine, 200; R. S. c. 106, §§ 7, 9, &c.; c. 134, § 1, &c. § 18; c. 77, § 4; *Bailey v. Smith*, 12 Maine, 196; *Tibbetts v. Shaw*, 19 Maine, 204; *Hall v. Jones*, 9 Pick. 446; *Smith v. Alston*, 1 Rep. Con. Ct. 104; *Governor v. McRhea*, Hawkes, 226; *Filkins v. Brockway*, 19 Johns. 170; *Brewer v. Sibley*, 13 Met. 175; *State v. McElroy*, 3 Strobb. S. C. 83; *Garland v. Britton*, 12 Ill. 232; *State v. Drake*, 36 Maine, 866; *McQuillen v. State*, 8 S. & M. 587; *Rawls v. State*, 8 S. & M.; 1 Tidd Pr. 583, 584, 589, 661; 1 Ld. Raym. 593; Willes, 479; *Colburn v. Tolles*, 13 Conn. 527; 1 Chitty Pl. 366, 454-456, 460, 466; *State v. Middleton*, 5 Port. 491; 2 Saund. 209, a (note 1); 10 East, 87 (note); Stephen Pl. 161, 423, 487; 1 Saund. Pl. 4; Gould Pl. 271, 397, and c. 5, § 142; 1 Bac. Abr. 37 and 38, 223-227, (§) 287; *Baker v. State*, 23 Miss. 244; *State v. Williams*, 5 Port. 130; *Lynes v. State*, 5 Port. 236; 2 Wharton's Indictments, § 1158; *State v. Ward*, 63 Maine, 225; 2 Saund. Pl. 297; 2 Salk. 497; *Findley v. People*, 1 Mich. 234; 3 Bla. Com. 303; 1 Lil. Ent. 1; 3 Chitty, Pl. 896; 3 M. & S. 154; 1 Sellon's Pr. 273; *Eichorn v. Le Maitre*, 2 Wils. 366; 2 Bl. R. 368; *Tompson v. Colin*, Yelv. 112; *Hazzard v. Haskell*, 27 Maine, 549; *Fogg v. Fogg*, 31 Maine, 302; *Burnham v. Howard*, 31 Maine, 569; *Southard v. Hill*, 44 Maine, 92, 95; *Severy v. Nye*, 58 Maine, 246; *McKeen v. Parker*, 51 Maine, 389; *Lovell v. Sabin*, 15 N. H. 29; *Dearborn v. Twist*, 6 N. H. 44; *Rüler v. Hamilton*, 4 Texas, 325; *Kendrick v. Davis*, 3 Coldw. (Tenn.) 524; 4 Maine, 439 (*Lowe's case*); *State v. Burlingham*, 15 Maine, 104; *State v. Symonds*, 36 Maine, 128; *State v. Clough*, 49 Maine, 573; *U. S. v. Coolidge*, 2 Gall. 868; 2 Ld. Raym. 1307; 5 Saund. 376; Yelv. 204.

J. Hutchings, county attorney, for the state, argued that the healing act was constitutional, and cited largely from the text and the cases collected in Cooley's Constitutional Limitations.

L. A. Emery, attorney general, on the same side, argued that the defective omission of the seal was amendable, and that the plea in abatement

was insufficient; he said: The allegation in the plea is not that the grand juror was not properly summoned, but is simply that the person did not possess the requisite qualifications. The words of the plea are, "was not duly and legally qualified to serve as grand juror." These words have reference to the qualifications of the individual, not to correctness of the procedure in summoning.

A person is qualified to testify as a witness, not by virtue of a subpoena, but by possessing a sound mind, and being of age and of knowledge.

A person is qualified to vote not by the warrant summoning him to the polls, but by being invested with the qualities prescribed by the Constitution.

A person is qualified for military service by possessing sufficient soundness of body and being between certain years of age, and this even in time of peace.

A person is "duly and legally qualified to serve as grand juror, not by virtue of an indented paper, passing between two other persons, but by reason of having been selected by his town, and his name placed upon the jury list or in the jury box, and being a citizen."

The plea in abatement therefore is *bad*, because it does not show the court what personal qualification is wanting; bad for want of sufficient allegation.

The specification following the general allegation does not conform to it. The general allegation is non-qualification, in the sense I have named; the specification is of an omission not in any qualities to be possessed by a grand juror, but of an omission in a paper issued by the clerk to a constable.

The general allegation is one of law, an assumption of a legal conclusion from data not disclosed. In other words, there is not in the plea any direct allegation of matters of fact, such as is required in such a plea.

The facts contained in the specification are not alleged directly, but only parenthetically, as a sort of rider to the main allegation.

Pleas in abatement must be single. Two causes of abatement cannot be joined. The respondent is not allowed to allege want of qualification, and also irregularity in process. In this respect the plea is bad for duplicity.

The respondent should have alleged that Smart was not duly selected or summoned; then this specification would perhaps have supported the allegation. As it is, the facts incidentally named do not support his legal proposition. He prays the abatement of the indictment because Smart was not a qualified person. He makes no prayer because of the want of a seal. He recites the want of a seal, but does not base his prayer on that.

Mr. Appleton, in reply. I. Venire not a part of the record, and need not be pleaded as such. *State v. Carver*, 49 Maine, 592.

II. Venire not being under seal, profert is unnecessary and will be regarded as surplusage. 1 Chitty Pl. 365, 366, and other authorities cited in argument in chief.

III. If profert is not properly made, the state should have pleaded *non est factum*, cravedoyer, or demurred specially. 1 Chitty Pl. 365, 366.

WALTON, J. The defendant is indicted for being a common seller of

intoxicating liquors without a license. The indictment was found by a grand jury drawn by virtue of venire not having the seal of the court upon them. He pleads this fact in abatement, and prays that the indictment may be quashed.

I. *Was a seal necessary.* Undoubtedly. The question is *res judicata* in this state. It was decided in *State v. Lightbody*, 38 Maine, 200. The court there held, not only that a seal was necessary, but that the doings of a grand jury drawn by virtue of venire not having the seal of the court upon them were illegal and void, and liable to be quashed on motion. That a seal is necessary upon venire for grand jurors is not, therefore, an open question in this state.

II. *Is the defect amendable.* We think not. Every indictment, to be valid, must be found by a grand jury legally selected, and competent to act at the time the indictment is found. So decided in *State v. Symonds*, 36 Maine, 128.

To put a seal upon these venire now would not make sealed instruments of them at the time they were served. They have performed their office and are *functi officio*. To seal them now, and then hold that they were legal instruments when served, and when they had no seals upon them, would seem more like trifling than the performance of a grave and important duty.

Besides, this court has three times decided that the seal upon a writ is matter of substance and not amendable. *Bailey v. Smith*, 12 Maine, 196; *Tibbetts v. Shaw*, 19 Maine, 204; *Witherell v. Randall*, 30 Maine, 168.

And the same point has been decided the same way in Massachusetts. *Hall v. Jones*, 9 Pick. 446.

In one case in this state, where the clerk omitted to affix the seal of the court to an execution, he was allowed to do so after it had been levied upon real estate. *Sawyer v. Baker*, 3 Maine, 29. But the court afterwards refused to allow a justice of the peace to make a like amendment; and referred to the above decision as having been made upon an *ex parte* motion; from which we infer that the court did not regard it as a reliable authority. *Porter v. Haskell*, 11 Maine, 177.

"So long as a seal is required to be affixed to writs and executions," said Mellen, C. J., in the case last cited, "though we may not be able to discover its real use, yet we must not dispense with what the law requires."

And in an early case in Massachusetts the court said that, while a strict adherence to technical forms might be inconvenient in particular cases, and might even appear at times to be beneath the dignity of the law, still, it is essential to the correct administration of justice that some forms and methods of proceeding be observed; that if the court felt at liberty to depart from the existing forms, still, there would be a point at which it must stop at last; and then it would be found no easier to comply with the new forms than with those which have been so long known and settled; and the inconvenience would not be less than is now experienced when indictments and other proceedings should be quashed for a departure from such new forms. *Commonwealth v. Stockbridge*, 11 Mass. 279.

A distinction has sometimes been made between original and judicial writs, using the latter term to distinguish such writs as issue during the

progress of a suit from those by which suits are commenced. And it has been said that while executions and other strictly judicial writs may be amended by having the seal of the court affixed to them, original writs cannot be thus amended. Such a distinction is referred to in *Bailey v. Smith*, 12 Maine, 196.

But this distinction, if it exists, is not favorable to the proposed amendment in this case. Writs of *venire facias* for grand jurors are not judicial writs, in that technical sense in which the term is used to distinguish such writs as issue during the progress of a suit from those by which suits are commenced. They more nearly resemble original writs, which, it has been held, cannot be thus amended.

But we think the distinction is a very shadowy one, and we attach no importance to it in this case. We rest our decision upon the broad principle that in criminal prosecutions all the proceedings should be strictly according to law; and that when the law requires a writ to be sealed before it is served, sealing it after it has been served is not a compliance with the law.

III. *Is the plea in abatement sufficient in form.* We think it is. It states the ground of objection to the indictment in language too clear to be misunderstood by any one. Nothing more should be required in criminal cases. The strictest technical accuracy, such as has sometimes been required in purely dilatory pleas in civil suits, should not be exacted in criminal cases. If the plea states a valid ground of defence in language too clear to be misunderstood, and is free from duplicity, nothing more should be required. In such cases the maxim, *Aucupia verborum sunt iudice indigna*, — a twisting of language is unworthy of the court, — is particularly applicable. To require a degree of exactness which it is practically impossible to comply with would be, in effect, a denial of the right to file such a plea at all. We think the plea is sufficient in form.

IV. We now come to the last and perhaps the most important question in the case. Pending this indictment, and in advance of the judgment of the court upon its sufficiency, the legislature passed an act declaring the *venires* for the grand jurors, by whom it was found, valid, notwithstanding they were issued without the seal of the court upon them; and declaring further that no act or presentment of said grand jurors should be in any wise invalidated by reason of such defect. Special Laws 1876, c. 307.

Can such legislation be sustained? Is it within the constitutional authority of the legislature to enact that indictments already pending shall be valid, notwithstanding they have been found by a grand jury not legally drawn? Clearly not. This question was fully considered in *State v. Doherty*, 60 Maine, 504.

The court there held that an act of the legislature that should attempt to validate indictments found by a grand jury not legally selected, would violate both the state and the United States Constitutions. That case was not decided upon any narrow ground. It was decided upon the broad principle that an indictment is not valid, and cannot be made valid by the legislature, unless it is found by a grand jury legally selected, organized, and qualified, "in accordance with some preëxisting law." Such is the very language of the court; and the authorities there cited fully sustain the position.

And in an earlier case in this state the court decided that the legislature cannot, by act or resolve, dispense with a general law for particular cases. *Lewis v. Webb*, 3 Maine, 326.

And Judge Cooley, in his work on constitutional law, lays it down as the result of all the authorities, that when the legislature undertakes to suspend the operation of the general laws of the state, the suspension must be general; that it cannot be made for individual cases or for particular localities. Cooley's Const. Lim. 391.

The act in question is objectionable upon both of these grounds. It does not purport to change the general law of the state. It does not declare that in no case shall the seal of the court be essential to the validity of venirees for grand jurors. It does not declare that in no case shall an indictment be invalidated by such an omission. Nor is it to have effect in any other county than the county of Penobscot. It goes no further than to declare that the venirees for this particular grand jury shall be valid, notwithstanding they were issued without the seal of the court upon them; and that no act or presentment of this particular grand jury shall be invalidated by reason of such defect; leaving the law with respect to all other counties, and all other grand juries in the county of Penobscot, and all other indictments, precisely as it was before. In other words, it was a direct attempt to dispense with the general law of the state, for a particular locality and for a particular class of cases, leaving it still in force for all other localities and all other cases. This, as we have already seen, cannot be done. Such an act is, in principle, as objectionable as a bill of attainder or an *ex post facto* law.

The escape of criminals through defects in mere matters of form is always cause for regret. But it would be cause for much deeper regret if the court should disregard any well settled rule of law in order to prevent such a result. We must not do evil that good may come. We must not ourselves become violators of the law in order to punish others. The remedy is the use of more care. *Exceptions sustained; indictment quashed.*

BARROWS, J., added the following supplementary concurring opinion: If the question, whether the want of a seal upon the venirees by means of which they were summoned vitiated the doings of a grand jury, were *res nova*, I should say that when grand jurors competent to serve had been drawn by the proper town officers in the manner prescribed by law, by virtue of a venire thus defective, and attended court in pursuance of the summons, and the court recognized the venire as its own writ, and caused the jurors thus attending to be duly empanelled and sworn, their acts in the position into which they had been thus inducted ought to be held good. In other words, that the directions in the statute with regard to the issuing of venirees were designed to enable the court to secure the attendance of a sufficient number of good and lawful men to serve as grand jurors, and that a question as to the sufficiency of the venire could arise only between the court and the municipal officers or the juror summoned, who would be competent to waive any such defect in the process by which he was brought into court.

I do not see how it is possible that any substantial right of a person charged with crime could be prejudiced by such a defect, or how it con-

cerns him any more than it would to know whether the grand juror came to court on foot or on horseback. If a person competent to serve as a grand juror, selected by the right men in the manner prescribed by the statute, presents himself in obedience to the call of the court, I do not see that it makes any difference whether that call is loud or low, or in all respects formal. If he did not come, the court would not be able to compel him if there was a defect in the writ by virtue of which he was summoned; but where the writ issues from the proper authority I should say that those who were directly affected by it alone could be heard to assert defects in it, and might waive them if they saw fit; and if they did waive them no other parties could complain.

But in the case of the *State v. Lightbody*, 88 Maine, 200, the court decided this precise question contrary to the view which I have taken.

Since then, I think it has rested with the legislature to declare it by positive enactment, if they did not deem a seal upon the venire essential to the validity of the doings of the grand jury. A venire means, of course, "a venire in due form." My attention has not been called to any change in the revisions or legislation since the decision in *State v. Lightbody*, which indicates a change of legislative intention respecting the statutes which there received a judicial construction. There is no indication of it even in Special Laws of 1876, c. 307.

Hence I concur in the result reached in the foregoing opinion.

**CIRCUIT COURT OF THE UNITED STATES FOR THE
DISTRICT OF KENTUCKY.**

[MAY, 1877.]

REMOVAL OF CAUSES. — SECTION 639 AND THE ACT OF 1875.

COOKE v. FORD.

The third subdivision of section 639 of the Revised Statutes is not repealed by the Act of March 3, 1875.

BALLARD, J. This action was brought in the Warren circuit court on the 7th of January, 1874. It was subsequently transferred to the Warren court of common pleas. The defendant Ford making no defence, judgment was rendered against him by default, according to the practice prevailing in the state. The defendant Arnold filed his answer, which tendered an issue of fact triable by jury. After the time at which the cause could have been first tried, and, in fact, after at least one mistrial, subsequent to the passage of the Act of Congress of 1875, Arnold filed his petition in said court for the removal of the suit into this court. At the time he filed this petition he made and filed in the state court an affidavit stating that he had reason to believe, and did believe, that from prejudice or

local influence he would not be able to obtain justice in the state court. The prayer of the petition was granted.

A copy of the record having been filed in this court, the plaintiff Cooke entered his appearance, and has moved that the cause be remanded to the state court.

The sole ground of the motion is that the petition for removal was filed in the state court too late.

The counsel of the plaintiff, with a frankness characteristic of those counsel only who perceive with clearness the true question involved in a case, concede that the defendant's application for a removal is literally covered by the provisions of the third subdivision of section 639 of the Revised Statutes; and he stakes his case on the position that these provisions are repealed by the Act of March 3, 1875; Statutes at Large, vol. 18, page 470.

The question thus presented for decision is a narrow one, but it is by no means free from difficulty. Neither the researches of counsel nor my own examination has developed any case which decides or even throws much light on the question. The only authority to which I have been referred bearing on the precise question at issue is an article in the Southern Law Review for July, 1876, written by Judge Dillon. The learned author, after indicating, doubtfully, his own opinion that the part of subdivision 3 which refers to the time of removal is not repealed by the Act of 1875, says: "This has been decided to be so in the eighth circuit by Mr. Justice Miller, and generally in the courts of that circuit, and, so far as we are advised, by the circuit courts elsewhere."

I should be disposed to follow, without question, a single decision of so eminent a judge as Mr. Justice Miller, if such decision were supported by a written opinion, and I should certainly not hesitate to follow the settled rule of decision in the several circuits; but the bare statement that Judge Miller has decided the question on the circuit, that his decision has been followed in his circuit, and, as far as known, in other circuits, though made by so accurate an author as the able judge of the eighth circuit, cannot dispense with the necessity of an independent examination of the question. Counsel have therefore discussed the question before me as an open one, and as such I propose to consider it. In prosecuting this examination I shall not refer to the acts of Congress relating to the removal of causes which were passed prior to the Revised Statutes. As the Revised Statutes repealed all such prior acts, reference to them would, I think, tend only to embarrass the inquiry. Indeed, the proposition discussed by counsel renders such reference supererogatory. The defendant's counsel rests his right to the removal on the ground that the third subdivision of section 639 of Revised Statutes is still in force; and the plaintiff's counsel rests his motion to remand on the ground that it is repealed.

Plaintiff's counsel does not, of course, insist that it is in terms repealed, but he maintains that its provisions are inconsistent with those of the Act of 1875, and hence that it is repealed by the express provision of that act which declares that "all acts and parts of acts in conflict with the provisions of this act are hereby repealed."

I shall, for a like reason, confine my attention to the provisions of the statutes which relate to the removal "of controversies between citizens of

different states," and shall omit all reference to the provisions contained in them which prescribe the amount necessary to give the court jurisdiction.

Omitting, then, all except what is necessary to elucidate the question before us, let us bring the provisions of the Revised Statutes and of the Act of 1875 together, and we shall then be the better able to see whether the latter are in conflict with the former.

Section 639 of the Revised Statutes provides that "any suit commenced in a state court . . . may be removed for trial into the circuit court. . . .

First. When the suit is . . . by a citizen of the state wherein it is brought, and against a citizen of another state. . . .

Second. When the suit is by a citizen of the state wherein it is brought against a citizen of the same and a citizen of another state.

Third. When the suit is between a citizen of the state in which it is brought and a citizen of another state.

The Act of 1875 authorizes the removal of any suit of a civil nature . . . now pending, or hereafter brought in a state court in which there shall be a controversy between citizens of different states.

In the first case the suit may be removed on the petition of the defendant only, filed in the state court at the time of entering his appearance in said court.

In the second case the suit, as against the citizen of another state, may be removed on his petition filed at any time before trial or final hearing.

In the third case the suit may be removed by the citizen of the state other than that in which the suit is brought, whether he be plaintiff or defendant, on his petition filed at any time before trial or final hearing of the suit, if before, or at the time, he files his petition he makes and files in the state court an affidavit stating that he has reason to believe, and does believe, that from prejudice or local influence he will not be able to obtain a fair trial in the state court.

In the last case (Act of 1875) the suit may be removed by either party — whether he be plaintiff or defendant; a citizen of the state in which the suit is brought or a citizen of another — on his petition filed in the state court, before or at the term at which the suit could be first tried and before the trial.

The first subdivision of section 639 is doubtless superseded by the more comprehensive provisions of the Act of 1875; and there is much ground for the position that the second subdivision is likewise superseded by a provision in the Act of 1875, which has not been here mentioned; but I cannot perceive that subdivision 3 is superseded by the latter act, or that the provisions of the two are in any respect inconsistent.

The Act of 1875 provides that when the suit presents a controversy between citizens of different states it may be removed by either party on his petition, filed before or at the term at which the suit could be first tried and before the trial. Subdivision 3 provides that when the suit is between a citizen of the state in which it is brought and a citizen of another state, such citizen of the other state may remove it on petition filed at any time before the trial or final hearing, if before or at the time he files the petition he makes his affidavit of "prejudice or local influence."

Taking the provisions together it follows: —

First. That no citizen of a state in which a suit is brought can remove it except on petition filed before or at the term the suit might first be tried.

Second. That when the suit is between citizens of different states, neither of whom is a citizen of the state in which the suit is brought, neither party can remove it except on petition filed before or at the term the suit might be first tried.

Third. But when the suit is between a citizen of the state in which it is brought and a citizen of another state, the latter may remove it on petition filed at any time before the trial or final hearing, if before or at the time he files his petition he makes an affidavit of "prejudice or local influence."

The first and second propositions are founded on the Act of 1875, and the third on subdivision 3, and thus reading the provisions of these statutes, they seem to me entirely consistent; nay, it appears that the failure of the Act of 1875 to repeal subdivision 3 was suggested by sound policy.

In a suit between citizens of different states, when neither party is a citizen of the state in which the suit is brought, there is no ground for investing either party with more than his strict right of removal. There is no ground for supposing that "prejudice or local influence" will affect one party more than the other, and therefore no ground of extending the time of his application beyond an early stage in the cause. So when the suit is between a citizen of the state in which it is brought and a citizen of another state, there is no ground for supposing that "prejudice or local influence" will operate against the former, and therefore there is no ground for extending the term of his application; but when the suit is between a citizen of the state in which it is brought and a citizen of another state, there may be many instances where "prejudice or local influence" may prevent justice being done the latter. This prejudice or local influence may not exist in the first stages of the cause, or, if it existed, it may not then be discovered. It may be subsequently developed.

There seems, then, to be the most substantial reason for allowing such citizen of another state to remove a suit at any stage before trial or final hearing, when it appears that, owing to such "prejudice or local influence," he cannot obtain justice in the state court.

Here I might rest the argument, but I think it possible to make the demonstration still more complete. Subdivisions 1 and 3 of section 639, and the Act of 1875, all authorized the removal of a suit on the petition of the defendant when the suit is by a citizen of the state in which it is brought against a citizen of another state. Of course I know that subdivision 3 also authorizes the removal of such a suit on the petition of the plaintiff when he is not a citizen of the state in which the suit is brought, and that the Act of 1875 not only authorizes the removal of such suits, but of all suits between citizens of different states at the instance of either party. But as I wish to compare the provisions which relate to the same character of suit, and to a removal demanded by the same party, I omit all reference to the provisions of subdivision 3 and the Act of 1875, which relate to a removal on the application of the plaintiff; and I also omit all reference to the provisions of the Act of 1875, which authorize a removal in any suit between citizens of different states, though neither

party is a citizen of the state wherein the suit is brought. I omit them because their presence only obscures the inquiry by diverting the attention from the true question, namely, the consistency or inconsistency between subdivisions 1 and 3, and the Act of 1875, as they all relate to a suit of the same character; that is, to a suit by a citizen of the state in which it is brought against a citizen of another state, and to a removal demanded by the same party.

I repeat, then, that subdivisions 1 and 3 and the Act of 1875 all authorize the defendant to demand a removal in a suit by a citizen of the state in which the suit is brought against a citizen of another state.

By subdivision 1 he may have a removal on petition filed at the time he enters his appearance in the state court.

By the Act of 1875 he may have it on petition filed before or at the term the cause could be first tried, and before the trial.

By the third subdivision he may have it on petition filed before the trial or final hearing of the suit, if, before or at the time of filing of said petition, he make and file an affidavit to prejudice or local influence.

It is thus readily seen that the provision of the Act of 1875 is inconsistent with that of subdivision 1. Each covers precisely the same ground, and, of course, both cannot stand. But it is just as readily seen that there is no inconsistency whatever between subdivision 3 and the Act of 1875. The one confines the application to a limited time; the other extends the time for a good and substantial reason. Indeed, it must be seen that there is as perfect consistency between subdivision 3 and the Act of 1875 as between subdivisions 1 and 3.

I have not overlooked the opposing argument founded on the title and the general scope of the Act of 1875. It is entitled "An act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from state courts, and for other purposes." To determine the jurisdiction of circuit courts seems to imply that this act only is to be referred to in order to determine what the jurisdiction of the circuit courts is. "To regulate the removal of causes from the state courts" seems to imply that in this act only are to be found the rules which govern the removal of causes. But the title of an act is entitled to little or no consideration in determining the meaning of provisions found in the body, and can never work the repeal of a prior act by its own force. If the provisions of the last act are consistent with those of the first, such consistent provisions remain in force, however clearly the legislature may have indicated, in the title of the last act, an intention to repeal the former.

Nor is the argument founded on the scope of the act more forcible. Its scope is, indeed, broad. It greatly enlarges the civil jurisdiction of the circuit courts, but it does not embrace the whole. It limits the jurisdiction which it confers to suits "where the matter in dispute exceeds five hundred dollars," but there are several provisions of the Revised Statutes which extend the jurisdiction to suits involving less than this amount. See section 629, subdivisions 10, 11, 12, 16, and 17. Nor can it be contended that it embraces all prior acts which relate to the removal of suits. See sects. 640, 641, 643, Rev. Stats. Of course, as it does not embrace all prior acts which confer jurisdiction or authorized removal of

suits, and does not, in terms, repeal them, it cannot, under any rule of interpretation, be held to repeal them by implication.

At one time, during the course of this investigation, I was strongly inclined to think that although the Act of 1875 does not, either in terms or by implication, repeal all prior acts which relate to the removal of civil causes from state courts to the circuit courts of the United States, it should be held to furnish the one rule for the removal of all such suits as it authorizes to be removed, and thus to repeal all prior acts which prescribe a different rule; that as it authorizes and prescribes a rule for the removal of all suits in which there is a controversy between citizens of different states, it repeals by implication all prior acts which relate to the removal of similar suits; and that as subdivision 3 does relate to the removal of a similar suit, — that is, a suit between a citizen of the state wherein it is brought and a citizen of another state, which is certainly included in a suit between citizens of different states, — it is repealed. But subsequent reflection has satisfied me that this argument is more specious than sound, and that its whole force is derived from its omission to notice the provision in subdivision 3 relating to "prejudice or local influence," which is nowhere found in the Act of 1875.

It is true, I suppose, that Congress cannot authorize the removal of a suit to the circuit court of which it cannot confer original jurisdiction on that court, and it is true that Congress cannot confer jurisdiction on the circuit court to try an ordinary suit between citizens of the same state on the ground of prejudice against one party or of local influence of the other; but it is also true that within the constitutional limits of the jurisdiction it may rest the right of removal upon such grounds as it deems best. It may authorize none to be removed, except on the ground of prejudice in the state tribunal against the party asking the removal or the local influence of the opposite party, or it may authorize the removal of suits between citizens of different states where nothing more is shown than different citizenship at one stage of the proceedings, and the same suits to be removed at another stage when prejudice, local influence, or other matter is shown. Now, this is precisely what is accomplished by the joint operation of the Act of 1875 and subdivision 3. The former requires the application for the removal of all suits, including a suit between a citizen of the state in which it is brought and a citizen of another state, when nothing more than different citizenship appears, to be made before or at the time at which the cause could be first tried. The latter allows the application for the removal of such a suit to be made at any time before trial or final hearing, when it also appears that the applicant is not a citizen of the state wherein the suit is brought, and that, owing to prejudice or local influence, he could not obtain justice in the state court.

But were the consistency between the Act of 1875 and of subdivision 3 less apparent, I should still be constrained, in view of the bearing of courts against implied repeals, to hold that the latter is still in force.

"To repeal a statute by implication, there must be such positive repugnancy between the provisions of the new law and the old that they cannot stand together or be consistently reconciled." *Wood v. United States*, 16 Pet. 342; *Cool v. Smith*, 1 Black, 459; *United States v. Tynen*,

11 Wallace, 92; *Hartford v. United States*, 8 Cranch, 109; *Brown v. County Commissioners*, 21 Penn. 27; *Brown v. Dean*, 5 Hill, 221; *Daruss, &c. v. Fairbairn, &c.* 3 Howard, 689; Potter's Dwarries on Statutes, 154; Sedgwick on Statute and Constitutional Law, 129.

In *Wood v. United States*, Mr. Justice Story said: "There must be a positive repugnancy between the provisions of the new laws and those of the old; and even then, the old law is repealed by implication only *pro tanto* to the extent of the repugnancy."

In *Cool v. Smith*, Mr. Justice Swayne, quoting Mr. Sedgwick, said: "A repeal by implication is not favored." "The bearing of the courts is against the doctrine, if it be possible to reconcile the two acts of the legislature together."

Mr. Dwarries says: "Every affirmative statute is a repeal of a precedent affirmative statute when its matter necessarily implies a negative, but only so far as it is clearly and indisputably contradictory and contrary to the former act in the very matter [Foster case], and the repugnancy such that the two acts cannot be reconciled."

A citation of these authorities was hardly necessary to support the argument in this case. The provisions of the Act of 1875, and those of subdivision 8, have been shown to be perfectly consistent. The latter, therefore, must be held to remain unrepealed without invoking any technical rule of construction, or relying on the disfavor in which the courts hold implied repeals; but I have not thought such citation entirely out of place, since, if doubt remains in the mind of any one after reading the preceding abstract decision, it must be dispelled on considering the authorities.

Let an order be entered overruling the plaintiff's motion.

SUPREME COURT OF PENNSYLVANIA.

[FEBRUARY, 1877.]

STATUTE OF LIMITATIONS. — NEW PROMISE MUST BE SPECIFIC.

MILLER v. BASCHORE.

Held, that the following: "I have received a letter from you some time ago, asking of me what I intend doing with balance of a note I owe you;" and after speaking of an arrangement to pay another creditor, "and after he is paid I will pay you all I owe you, and if I can do anything for you before that time I will do so. You need not trouble yourself about me that I will not pay you, for I expect to pay all I owe," did not constitute a new promise.

GORDON, J. The evidence was not sufficient to relieve the claim of the plaintiff below from the effect of the statute of limitations. In order to effect such a result there must be a clear and definite acknowledgment of the debt, a specification of the amount due, or a reference to something by which such amount can be definitely and certainly ascertained, and an

unequivocal promise to pay. In the case under consideration the acknowledgment and undertaking of the defendant lack these essential characteristics. He writes, "I have received a letter from you some time ago asking of me what I intend doing with balance of a note I owe you." In this there is nothing specific or definite, for it is not stated what note is referred to, neither is the amount of the balance indicated. The latter part of this letter is not less indefinite; for, after speaking of an arrangement to pay another creditor with whom he had compromised, he says, "and after he is paid I will pay you all I owe you, and if I can do anything for you before that time I will do so. You need not trouble yourself about me that I will not pay you, for I expect to pay all I owe." If, in *Weaver v. Weaver*, 4 Sm. 152, the writing by the debtor under an account stated, "I agree to settle with him for the above balance and any other just claim between us," was not sufficient to take the claim out of the operation of the statute, much less is the promise above stated. In the case cited the claim and the amount were fixed beyond doubt or cavil, the fault occurred in the want of a promise to pay the sum thus fixed; for the undertaking was not to liquidate the account stated, but only to settle that and any other just claim his creditor might have against him; it was, therefore, at best, but a promise to pay what might appear to be due upon an adjustment of their several accounts. Applying the above stated doctrine to the case in hand, it is found to be utterly wanting in every element necessary to rescue it from the grasp of the statute. The defendant promises to pay a balance of a note, but neither note nor balance is stated. He promises to pay what he owes, but whether that is much or little we are not informed. There is in fact neither the required certainty nor perspicuity in the evidence produced to break down the defence, hence the attempt has resulted in failure.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

[SEPTEMBER, 1876.]

EVIDENCE. — INJURY TO MORTGAGED PREMISES. — DAMAGES.

KING v. BANGS.

In an action brought by a mortgagee against one who has injured the mortgaged property by a removal of fixtures, evidence that the mortgagee, after the alleged injury and before the action was brought, under the power in his mortgage sold the mortgaged premises for more than enough to pay his debt and all prior incumbrances, is admissible in mitigation of damages.

TORT for breaking and entering the plaintiff's close, and removing certain fixtures therefrom. The declaration contained two counts. At the trial in the superior court, before Brigham, C. J., the jury returned a verdict for the plaintiff, and a bill of exceptions was allowed, the material parts of which appear in the opinion.

G. W. Park, for the defendants.

J. F. Pickering, contra.

COLT, J. Both counts in the plaintiff's declaration are for trespass to real estate, and allege the taking and carrying away of the fixtures and other parts of a dwelling-house thereon standing. The plaintiff at the trial claimed to recover as mortgagee for the injury to his security. The defendants offered to show that after the injury complained of, and before this action was begun, the plaintiff, under the power of sale in his mortgage, sold the premises for more than enough to pay his debt and all prior incumbrances, and conveyed the same to the purchaser. The defendants' answer was a general denial, but no question was then made or is now made as to the admissibility of the evidence under the pleadings. The judge ruled that the measure of damages was the actual amount of the injury done to the building, and excluded the evidence. We are of opinion that this evidence upon the question of damages was improperly excluded.

A mortgagee, if there is anything due on his mortgage, whether in possession or not, may maintain an action of tort, and recover the full value of fixtures wrongfully removed, on the ground that his security has been thereby diminished. Under our decisions, the right to recover does not depend on proof of the insufficiency of the security; because, until the whole debt is paid, the mortgagee has a right to the whole security pledged, and, if deprived of any part of it, he is entitled to full redress therefor. A mortgagor in possession may also recover for the same injury in an action of trespass, by way of aggravation. It does not follow however, that the defendant is compelled to pay full damages to each successively, because he may escape the claim of the latter by showing that he has settled with one having superior right; and, satisfaction so made, discharges the claims of all. When the action is trespass for a breach of the close, damages for the removal of the fixtures are incidental to the action and separable from it. But, in whatever form recovered, they arise out of and pertain to the estate, and, when recovered by a mortgagee, must be applied by him in payment of the mortgage debt. It was accordingly held in *Gooding v. Shea*, 103 Mass. 360, that a mortgagee could recover the full amount of the damages caused to the estate by the removal of the fixtures, without regard to the sufficiency of the security, and although the mortgagor in possession had sued the defendant for the same acts. See, also, *Byrom v. Chapin*, 113 Mass. 308. The rule which prevails in New York is otherwise, and the plaintiff is required in such case to show the insufficiency of the security. *Lane v. Hitchcock*, 14 Johns. 213; *Gardner v. Heartt*, 3 Denio, 232.

In the case at bar, evidence of the payment of the plaintiff's mortgage and the termination of his interest in the mortgaged estate was offered by the defendants. The general rule is that damages must be precisely commensurate with the injury which the plaintiff suffers by the act of wrong at the time it was committed; but under this rule the defendant is constantly permitted to give in evidence the plaintiff's subsequent change of relation to the property, for the purpose of showing that the damages, to which he would otherwise have been entitled, have been thereby diminished. Thus, if he has only a special property, or a qualified interest, subject to which the defendant has acquired title, and the plaintiff can be

indemnified by a sum less than the full value, that sum is the measure of damages. *Chamberlin v. Shaw*, 18 Pick. 278. So when in trover the property has been restored to the plaintiff or been applied to the payment of his debts, or otherwise come to his use, the fact may be shown in mitigation of damages. *Pierce v. Benjamin*, 14 Pick. 356; *Kaley v. Shed*, 10 Met. 317; *Squire v. Hollenbeck*, 9 Pick. 551. And in no case can a party having a special or qualified interest recover damages beyond the extent of his interest, except as he is trustee, and responsible over to the general owner. *Jarvis v. Rogers*, 15 Mass. 389. If the plaintiff were permitted here to recover full damages, he would either hold the same with no responsibility over, or he would be obliged to pay it over immediately to the owner of the equity at the time of the injury, and who then had a right of action for it. The owner of the land subject to the mortgage is the only one, on the evidence offered, who appears to have suffered any actual damage by the removal of the fixtures; and there is no rule of law which prevents the defendant from showing that fact in just mitigation of the plaintiff's claim for damages at least.

Exceptions sustained.

RESPONDEAT SUPERIOR. — EMPLOYING COLLECTING AGENT, ETC.

CASWELL v. CROSS.

One who employs a firm of collecting agents, in response to an advertising card, in which they announce that they will treat his debtors "with delicacy, so as not to offend them, or with such severity as to show that no trifling is intended," giving no special instructions, authorizes them to use such means as they see fit to adopt, in the prosecution of his business for his benefit, and is responsible therefor.

TORT for an arrest and false imprisonment. The case was submitted to the superior court, and, after judgment for the defendant, to this court on appeal, on an agreed statement of facts, in substance as follows: —

The defendant employed J. E. Cupples & Co. to collect a bill in his favor against the plaintiff, amounting to twelve dollars and accrued interest. Cupples & Co. advertise and hold themselves out to the public as a "Law and Collection Bureau," and have their place of business on School Street, in Boston. They are not regularly admitted attorneys, but they sue out writs upon claims placed in their hands for collection, sometimes appearing in court as the attorneys of record in their cases, and sometimes using the names of regularly admitted attorneys.

In all courts in the vicinity of Boston, where they are permitted to do so, they enter their own appearance only, and always retain the exclusive control and management of their cases in and out of court, whenever an attorney's name is entered of record. They use the name of a regularly admitted attorney for the mere purpose of complying with the rules of court. In addition to appearing in court in their own cases, they examine poor debtors arrested by them, and do the general business of reg-

ular attorneys, in making writs and declarations, levying and collecting executions, &c.

Upon the claim placed in their hands by the defendant they brought an action against the plaintiff in the municipal court of Boston, using the name of a regularly admitted attorney, and recovered judgment on September 1, 1874, on default, for the amount of \$15.12 debt and \$8.19 costs, and took out an execution in favor of the plaintiff on said judgment, which execution was duly returned in no part satisfied.

Cupples & Co. then brought another action upon said judgment in the police court of Charlestown, and recovered a new judgment, including the full amount of the prior judgment and costs. They then took out an execution on this last judgment, with the usual directions for the arrest of the defendant in said action; and one Perkins, who was a clerk in the employ of Cupples & Co., and who had the general management of their cases in and out of court, made an affidavit as required by law for the arrest of poor debtors, which affidavit was duly attached to said execution. Perkins then gave said execution to an officer with instructions to arrest the judgment debtor. The officer arrested him; he recognized with surety to take the oath for the relief of poor debtors, gave the required notice, submitted himself to be examined, was examined by Perkins in behalf of the judgment creditors, and was finally discharged from arrest, upon taking said oath.

The judgment upon which execution was issued, and upon which the plaintiff was thus arrested, was for less than twenty dollars, excluding the costs in that and the prior action; but this fact was unknown to the plaintiff or his attorney until after the oath had been administered to him, — both judgments having been upon default and without his actual knowledge.

The defendant gave Cupples & Co. no special instruction as to the manner in which they were to proceed, or the proceedings they were to adopt in collecting said bills. He called upon them in answer to their advertising card sent to him, which was as follows: "Office of 'The New England Collecting Agency' for the special collection of physicians' accounts. 3 School Street, Room 15. Boston, Mass., Dec. 1873. Sir: As the close of the year is now at hand when it is customary for books to be made up and accounts sent out, we would again direct your attention to our agency for the collection of physicians' accounts. We have made complete arrangements for systematically and promptly collecting all such, throughout the city and neighborhood. Every effort is made to trace parties who have moved, and most energetic steps are taken to compel reluctant and dilatory debtors to settle. Should you intrust us with your collections we shall take your instructions as to the manner in which you wish your debtors treated, whether with delicacy, so as not to offend them, or with such severity as to show that no trifling is intended. Our terms are ten per cent. commission on the amount we collect. Settlements made as often as wished. Yours obediently, J. E. Cupples & Co." He had no knowledge of the manner in which they collected bills and conducted their business, except such as he derived from this advertisement, and he had no actual knowledge of any of the proceedings of Cupples & Co. and Perkins, in trying to collect his claims against the plaintiff,

or in making said affidavit, or in causing the plaintiff to be arrested, until after the bringing of this suit. He left with them several other claims against other parties for collection, at the same time, Cupples & Co. agreeing with him to make no charge against him on any of his claims unless they were successful in making the collections.

Upon the foregoing facts, if the plaintiff was entitled to recover, a default was to be entered against the defendant, and the case stand for the assessment of damages only; otherwise, judgment for the defendant.

P. H. Cooney, for the plaintiff.

C. W. Turner, *contra*.

LORD, J. It is not necessary in this case to consider whether the relation of attorney and client existed between Cupples & Co. and the defendant, nor whether the defendant understood Cupples & Co. to hold themselves out as attorneys at law. The card sent by them to the defendant, which he received and to which he responded, contains ample notice of the character of the firm and of the business pursued by them. They held themselves out as professional duns; a character quite well enough known. Their card contains full notice of the mode in which they did business. They announced that they would act under instructions; that they had modes of doing business, either with delicacy which could not offend, or with a severity which indicated that there was to be no trifling. We think any person who employs such agents with such knowledge on his part, giving no special instructions, authorizes the agents to use, and becomes responsible for injuries caused by the use of, such means as they see fit to adopt in the prosecution of his business for his benefit, whether those means be honorable and proper, or whether resort is had to insolence and insult, or to misuse or abuse of legal process. They are his servants to do his work in their own manner, though that manner may be unjustifiable or illegal. This view of the case renders it unnecessary to inquire whether the mere fact that the present defendant was the plaintiff in the proceedings against Caswell, and that the execution upon which Caswell was arrested was in his name and prosecuted for his benefit, would be of itself sufficient to hold the defendant responsible for the illegal arrest and imprisonment of the plaintiff. Upon the agreed statement, therefore, the defendant is to be defaulted, and the case is to stand for

Assessment of damages.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

(To appear in 121 Mass.)

CRIMINAL LAW. — POWER OF LEGISLATURE IN RESPECT OF GRAND JURY. — EVIDENCE. — INDICTMENT. — PLEADING, ETC.

COMMONWEALTH v. BROWN.

The provisions of the Gen. Sts. c. 132, as to the selecting and drawing of jurors, are within the constitutional authority of the legislature.

The St. of 1875, c. 5, providing that the grand jurors, empanelled at a certain term of the superior court, for the county of Suffolk, and who were citizens of the class qualified by the general laws to serve as grand jurors, "shall for all purposes be deemed and held to be the grand jury of said county, duly and legally drawn, summoned, returned, and empanelled," until a certain time, "notwithstanding any irregularity in any writ of *venire facias*, or in the drawing, summoning, returning, and empanelling of said grand jurors," is constitutional as to indictments found by said grand jurors after its passage.

If a bad plea in bar in a criminal proceeding, which presents merely a question of law, is submitted to a jury, and, after a verdict thereon for the commonwealth, overruled by the judge, the defendant has no ground of exception to the order submitting the question to the jury, or to the rulings at the trial of the plea.

Upon the trial of an indictment for an illegal operation upon a woman, with intent to procure a miscarriage, an officer was permitted to testify that he took the defendant, after his arrest, into the presence of the woman, and asked her if the defendant performed an operation upon her; that the woman said he did; that the defendant asked the woman if she had been operated on previously by any other person; that the woman said, "No, she came there to be operated on to get rid of a child." *Held*, that the evidence was admissible.

Upon the trial of an indictment for an illegal operation upon a woman, with intent to procure a miscarriage, certain surgical instruments and a speculum chair, found in the defendant's house, were exhibited to the jury. There was evidence that the chair had been used in performing the operation, and medical experts were allowed to testify that the surgical instruments were adapted to producing abortions, although none of them could be said to be so exactly designed for such use as not to be appropriate also for use in lawful acts of surgery. *Held*, the defendant had no ground of exception to the admission of this evidence.

Medical books cannot be read in evidence to the jury.

No exception lies to the refusal of the judge presiding at the trial of a criminal case, to give instructions as to matters of fact.

No exception lies to a refusal to instruct the jury in the precise words requested, if the instruction is given in substance.

Upon the trial of an indictment for an illegal operation, with intent to procure a miscarriage of a woman who had applied to the defendant for that purpose, the woman testified as a witness, and the defendant requested an instruction that, though she were not to be considered as an accomplice, the jury were to take her statements "with great circumspection and caution and discredit." This was refused; but the judge instructed the jury that the fact that the witness was implicated in the alleged acts of the defendant might be considered as affecting her credibility and the weight of her testimony. *Held*, that the defendant had no ground of exception.

An indictment under the Gen. Sts. c. 165, § 9, alleged that A. B., at a time and place named, "with force and arms, did unlawfully use a certain instrument, a more particular description of which is to said jurors unknown, by then and there forcing and thrusting said instrument into the body and womb of one C. D., being then and there pregnant with child, with the intent of him, said A. B., thereby then and there to procure the miscarriage of the said C. D.," and concluded in the usual form. *Held*, that the indictment was sufficient.

An indictment may contain two or more counts alleging distinct offences, if they are of the same general description, and the mode of trial and the nature of the punishment are the same.

INDICTMENT in six counts. The first count alleged that David R. Brown, on December 1, 1874, at Boston, "with force and arms, did unlawfully use a certain instrument, a more particular description of which is to the said jurors unknown, by then and there forcing and thrusting said instrument into the body and womb of one Ann Powers, otherwise called Emma L. Smith, she, the said Powers, otherwise called Smith, being then and there pregnant with child, with the intent of him, said Brown, thereby then and there to procure the miscarriage of the said Powers, otherwise called Smith; against the peace of said commonwealth and the form of the statute in such case made and provided."

The fourth count alleged that the defendant, on December 10, 1874, at Boston, "with force and arms, did unlawfully use a certain instrument, a more particular description of which is to the said jurors unknown, by then and there forcing and thrusting said instrument into the body and womb of one Frances Ordway, otherwise called Frances A. Chase, she, the said Frances, being then and there pregnant with child, with the intent of him, said Brown, thereby then and there to procure the miscarriage of her, the said Frances; against the peace of said commonwealth and the form of the statute in such case made and provided."

The indictment was found by the grand jury empanelled at January term, 1875, of the superior court, to serve for six months, and was returned into court on February 6, 1875. On the first day of February term, before the grand jury had proceeded to the transaction of any business, and again, upon being called upon to plead to the indictment, the defendant filed a "special plea to the array of the grand jury," alleging that they were not impartially drawn from the whole body of adult male citizens of the county; that divers competent citizens were arbitrarily and illegally omitted from the list; and that they were not duly summoned and returned; and setting forth more particularly the grounds of objection. The district attorney filed a replication to this plea, traversing the allegations thereof, and setting up the St. of 1875, c. 5.

Before the empanelling of a jury for the trial of this plea, the defendant tendered a similar "special plea to the array of the petit jury," which Brigham, C. J., overruled, without calling upon the district attorney to file a replication thereto, and ordered the trial to proceed upon the special plea already filed.

Upon such trial it appeared that the venire for the grand jury was issued in due form; that the jury list had been prepared by the mayor and aldermen by placing thereon such persons as they thought to be qualified to serve; that the mayor and aldermen, acting together with the city clerk, drew from the box the names of twenty-two persons, and afterwards of nine other persons, and the clerk made separate records of the twenty-two names and of the nine names, placing the latter in the order of their drawing, and delivered copies of both records, omitting from the first the name of one whom he discovered by the records of the city to have served as a juror within three years, to a constable, who dis-

covered by the same records that three others of the twenty-two were exempt by law by reason of their employments, and summoned the remaining eighteen of the twenty-two, and four of the nine, and those so summoned were returned and served as grand jurors. The further particulars of the mode of drawing, summoning, and returning these jurors are not material to be set forth.

The judge instructed the jury that the grand jury was a legal body, and the indictment lawfully presented. The jury returned a verdict for the commonwealth; the defendant alleged exceptions to the rulings aforesaid, and to other rulings at that trial, which it is unnecessary to state; and the case was continued to March term, 1875.

At that term, before the jury were empanelled, the defendant filed a motion to quash the indictment on the ground that "there is charged therein no legal offence legally, specifically, and formally set forth, and the same is uncertain and insufficient." Brigham, C. J., overruled the motion. The defendant then pleaded not guilty, and was tried, and found guilty on the first and fourth counts of the indictment, and not guilty upon the other counts; and a bill of exceptions in substance as follows was allowed:—

Emma L. Smith, called by the government, testified that on August 5, 1874, she saw the defendant at his office on Howard Street, in Boston, and consulted him as to her condition, and was thereupon told by him that she was either pregnant or had a tumor, and that his price for relieving her, by medicine, would be \$25, or by an operation, \$50; that the witness expressed her wish to take medicine for her relief, and, thereupon, received from the defendant a half package of medicine, for which she paid him \$13; that the witness used this medicine as directed by defendant, without relief, and received, afterwards, more medicine from the defendant, for which she paid him \$6, which she used without effect, and so subsequently stated to defendant, who thereupon advised her to submit to an operation by him, and exhibited to her instruments for operating on pregnant women, one of which, a steel instrument, he told her would throw her into labor in a few hours, and the other, a rubber instrument, with a syringe attached, which he told her might not operate for twenty-four hours or longer; that subsequently the defendant introduced into her person and to her womb, an instrument, which the witness did not see, causing her pain; that this operation was performed in a room she believed to be the defendant's office; and that, in about three days afterwards, the witness, who remained in the house in which said office was, was delivered of a male fœtus, which had apparently been a living fœtus within a few days of its birth.

Frances A. Chase testified that on or about December 10, 1874, she called at the defendant's office, on Howard Street, saw the defendant, and told him she thought she was four months advanced in pregnancy, and asked him if he took such cases, and the price; that the defendant said he took such cases and the price was from \$100 to \$500, his lowest price \$50; that she told him that all she could spare was \$25; and that he then told her he sometimes took payment partly in cash and partly in notes, and agreed to take her case on these terms; and thereupon, two promissory notes were written for her to sign; and, on the evening of the same day,

she carried these notes to defendant, paid him \$25, and went into a room adjoining his office, where he caused her to be placed in a chair (the same which was exhibited to the jury at the trial), and made an examination of her, which caused her considerable pain, which the defendant assured her would be over in a few seconds; and the defendant told her, as he assisted her from the chair, that she would be all right; that the witness remained in said house the following night, in a room to which the defendant introduced her, and also during a week afterwards, when she was delivered of a male fœtus, which was living before the acts of the defendant upon the witness's person.

John F. George, a police officer, testified as follows: "I am a police officer of Station 3, and assisted in arresting the defendant about six o'clock P. M., on Sunday, December 13, 1874, at house 46½ Howard Street, and on the same night took some surgical instruments — which I now exhibit to the jury — from the drawer of a secretary from a back parlor up one flight of stairs. On the following day I took the defendant into the presence of Emma L. Smith and Frances A. Chase, and asked them in the defendant's hearing and presence if they knew him; both said they knew him, one knew him as Dr. King, the other knew him as Dr. Brown. I asked them if he performed an operation on them, and they said he did. The defendant asked if they had been operated on previously by any other person; they said No, they came there to be operated on to get rid of children. The instruments exhibited are all, of any account, I found in the secretary; I might have left some others there; I took only such as I thought would apply to this case, as Dr. Cilley suggested; there were some small instruments there like sail-needles." All this testimony of the witness George, as well as the exhibition of the surgical instruments by him, were excepted to by the defendant.

A chair, called by some of the witnesses "a speculum chair," which there was evidence tending to prove was used by the defendant in performing the operation upon Frances A. Chase, was brought into court during the trial, and it and its mechanism were exhibited to the jury, against the objection and exception of the defendant. The testimony of two persons who were physicians and surgeons was admitted, against the objection and exception of the defendant, both of whom testified that most of the surgical instruments exhibited were adapted to producing the abortion of pregnant women, although none of them could be said to be so exactly designed for such use as not to be appropriate also for use in necessary and lawful acts of surgery.

The defendant testified in his own behalf that the surgical instruments exhibited were none of them adapted to use in producing abortion, and were all adapted and in common use in lawful and necessary surgical operations. The defendant explained to the jury the purpose and use of each instrument and of said speculum chair, as he testified. The defendant offered and asked permission to read to the jury books of medical authority as to any matter of which medical experts might testify, and as to the uses of any of the instruments exhibited. The evidence of such books was rejected by the court, and the defendant excepted. The defendant testified that he was a graduate of the medical department of Bowdoin Col-

lege, and had practised medicine and surgery for from thirty to forty years; that the witness Emma L. Smith, called upon him to be treated for a tumor on the neck of her womb, declaring that she did not think she was pregnant, and that the defendant examined and treated her medicinally and surgically for a tumor discovered by him on the neck of her womb; and that he neither administered to her or advised her to use any medicine which was capable of producing any abortive effect, or, by the use of any surgical instrument, did any act for the purpose of producing or tending to produce an abortion. The defendant also testified that the witness, Frances A. Chase, came to his office, in company with a man, who stated to the defendant that this woman had been operated on by a midwife to procure an abortion, and that the defendant undertook, at the request of this man, to treat said Chase, medicinally and surgically, to relieve her of a dead fœtus in her womb, and of the maladies incident to her condition, when the defendant saw her for the first time; that the defendant examined and treated and operated upon the said Chase, exclusively for the discovery of a dead fœtus in her womb, and its removal, and the cure of maladies incident to the death of that fœtus, and denied any unlawful or criminal act in relation to her for the purpose of causing or having any tendency to cause abortion of a living fœtus. The defendant also put in testimony tending to contradict the testimony of George, the policeman.

The defendant submitted thirty requests for instructions to the jury, of which eleven were given; and the others are sufficiently stated in the opinion, except the following:—

“20. That an operation for the removal of the tumor alone, although produced by the defendant, will not enable the jury to convict the defendant upon this indictment.

“25. That under the first count, if it is doubtful whether abortion was produced or attempted by instruments or other means used for procuring abortion, without lawful justification, then the defendant is not guilty.

“29. That, although the two women are by law not to be considered or treated as accomplices, still the jury are to take their statements with great circumspection and caution and discredit.”

The judge also instructed the jury as follows: “As by the defendant’s testimony it is confessed that he inserted into the bodies of each of the women named an instrument, which does not appear to have been known to the grand jury who found the indictment, on December 10th and on December 11th last, at Boston, the only practical questions to be considered by the jury in relation to the first and fourth counts are, first, whether, at the time when this instrument was inserted into their bodies by defendant, the women were pregnant with child; and second, whether this instrument was thus inserted into the bodies of these women unlawfully, that is to say, without justification in law. As to these two questions, the jury are instructed that the allegations of the indictment, that an instrument was forced and thrust into the bodies of these women, are substantially and sufficiently proved by evidence that such instrument was inserted into their bodies by any degree of mechanical force.

“As to the first question, the jury are instructed that the proof on the part of the prosecution must be, that at the time of the defendant’s acts

upon the bodies of said Ann Powers and said Frances Ordway, they were pregnant with children which had vitality, so that in the course of nature they could mature into living children. The statute is intended to prevent and punish the destroying of embryo human life, the germs of human life before birth in the course of nature, and would not apply to acts to procure the miscarriage of a woman having a dead foetus in her womb.

"As to the second question, affecting the lawfulness of the defendant's acts, the jury are instructed that a physician may lawfully procure the miscarriage of a woman pregnant with child, by any means appropriate and reasonable for that purpose, directly or indirectly applied, if in so doing he acts in good faith for the preservation of the life or health of such pregnant woman. The justification of a physician thus acting must depend upon his exercising his best skill and judgment, and in the honest belief that his acts directly applied to produce a miscarriage, or applied to the treatment of a disease so as to involve a miscarriage, as a not unusual incident of such treatment, are necessary to save such pregnant woman from great peril to her life or health. Acts for the purpose of procuring the miscarriage of a woman pregnant with child, to be unlawful, need not be done in a spirit of wanton cruelty or wicked revenge; but would be unlawful if done from any wicked, base, or sordid motive, offensive to good morals or injurious to society. Such acts would be none the less unjustifiable because done by the consent or upon the solicitation of the pregnant woman whose miscarriage was attempted to be procured, or because done to screen such a woman from exposure or disgrace, or for gain or reward.

"The possession by a physician of surgical instruments adapted to use in procuring the miscarriage of pregnant women would be explained consistently with that physician's innocence of any intention to use them for unlawfully procuring miscarriages, if they were instruments also adapted equally to other and legitimate uses in surgery or midwifery, unless their extraordinary number and variety was in more than ordinary proportion to the whole number and variety of surgical instruments possessed by him, or the exigencies of his practice furnished him occasions for using; but the significance as evidence, of the possession of any number or variety of surgical instruments adapted especially to procuring miscarriage of pregnant women, would more or less depend upon circumstances, usual or unusual, ordinary or extraordinary, attending the mode of their possession and keeping, and the exigencies of such physician's practice.

"Inasmuch as Ann Powers and Frances Ordway, by their solicitation of or consent to the acts of defendant, alleged to be unlawful, were severally implicated in these acts, and their unlawful and criminal character, that fact may justly be considered by the jury as affecting their credibility as witnesses and the force and weight of their testimony."

After verdict, the defendant filed a motion in arrest of judgment for the same reason assigned in the motion to quash the indictment. This motion was overruled; and the defendant alleged exceptions.

The court directed the objections to the grand jury to be first argued.

G. W. Searle, for the defendant.

W. C. Loring, Assistant Attorney General (*C. R. Train*, Attorney General, with him), for the commonwealth.

GRAY, C. J. The court has no doubt that the provisions of the Gen. Sts. c. 132, as to the drawing and selecting of jurors, are within the constitutional authority of the legislature. Both before and since the adoption of the Constitution of the commonwealth, the Legislature of Massachusetts has defined the persons who should constitute the class from which jurors should be taken, and has authorized the list to be made up of such persons as the municipal authorities should select from that class. Anc. Chart. 144, 221, 282, 332; Sts. 1784, cc. 4, 7; 1793, c. 63; 1802, c. 92; 1807, c. 140; 1812, c. 141; Rev. Sts. c. 95; 6 Dane Ab. 227-230; *Commonwealth v. Smith*, 9 Mass. 107; *Page v. Danvers*, 7 Met. 326. And see U. S. Sts. 1789, c. 20, § 29; 1800, c. 61; U. S. Rev. Sts. § 800; *United States v. Dow*, Taney, 34, 36; *Clinton v. Englebrecht*, 13 Wall. 434, 444.

The grand jury by which this indictment was found was empanelled at January term, 1875, of the superior court, to serve for six months; the venire issued by the clerk of the court was in due form; and the persons who constituted this grand jury were qualified by law to serve as grand jurors. Gen. Sts. c. 171, §§ 1-3. The special objections made by the defendant to the constitution of this grand jury are based upon errors in the mode of drawing, summoning, and returning them.

But by the St. of 1875, c. 5, which was passed and took effect on February 5, 1875, it was enacted by the legislature that the grand jurors empanelled at January term, 1875, in Suffolk should "for all purposes be deemed and held to be the grand jury of said county, duly and legally drawn, summoned, returned, and empanelled" for each term within the six months, "notwithstanding any irregularity in any writ of *venire facias*, or in the drawing, summoning, returning, and empanelling of said grand jurors."

This indictment was presented to the court after the passage of this act. The question before us therefore is whether this statute was constitutional so far as concerned future indictments. The legislature might have provided that the grand jurors should be drawn, summoned, and returned by the mayor and aldermen, the city clerk, and the constable, in the very way which was in fact followed in this case; and it was within its constitutional authority to enact that citizens of the class qualified by the general laws to serve as grand jurors, and who were in attendance upon the court as such, in one or all of the counties of the commonwealth, although irregularly drawn, summoned, and returned, should constitute the grand jury of the county for the residue of the usual period of service. As applied to indictments found after the passage of the statute, the statute is not *ex post facto*, and is clearly within the constitutional power of the legislature. *Commonwealth v. Phillips*, 11 Pick. 28; *Locke v. New Orleans*, 4 Wall. 172; *Gut v. State*, 9 Wall. 35. .

This case does not require us to consider whether this statute could be held to be within the class of laws correcting mistakes and curing defects and irregularities in past proceedings of courts and other public bodies within their general jurisdiction and authority, and thus to make valid indictments found before its passage. See Prov. St. 1760 (33 Geo. II.) § 6, Anc. Chart. 627; *Foster v. Essex Bank*, 16 Mass. 245, 273; *Simmons v. Hanover*, 23 Pick. 188, 194; *Denny v. Mattoon*, 2 Allen, 361,

877, 384; *State v. Doherty*, 60 Maine, 504; *Thomson v. Lee County*, 8 Wall. 327, 331.

The result is, that the objections to the grand jury by which this indictment was found cannot be sustained, and that, upon the other points stated in the exceptions, the case must stand for *Further argument*.

The case was submitted on briefs, on the remaining questions, to the whole court, in June, 1876.

G. W. Searle, for the defendant.

C. R. Train, Attorney General, & *W. C. Loring*, Assistant Attorney General, for the commonwealth.

MORTON, J. It is settled by the former decision in this case that the St. of 1875, c. 5, cured any defects which may have existed in the drawing, summoning, returning, and empanelling of the grand jury who found the indictment against the defendant, and that, therefore, the facts alleged in the defendant's special plea furnished no cause for challenging the array of the grand jury. The superior court might and should have overruled the special plea as matter of law. *Commonwealth v. Lannan*, 13 Allen, 563. There were no material facts to be submitted to a jury or other body of triers.

But the error of the presiding justice, in submitting the special plea to a jury, was immaterial. It has been repeatedly held that, where a question of law is erroneously submitted to a jury, if the jury decide it rightly neither party has any ground of exception, because he is not aggrieved. *Ricker v. Cutter*, 8 Gray, 248; *Krebs v. Oliver*, 12 Gray, 239; *Smith v. Faulkner*, 12 Gray, 251. For the same reason, if there were any erroneous rulings in the trial of the defendant's special plea before the petit jury, he has no ground of complaint, because he was not in any manner prejudiced thereby. As the whole proceedings in that trial were immaterial, and the final ruling of the court overruling the special plea was correct as matter of law, it is not necessary to consider whether the several rulings of the superior court during such trial were correct, because the defendant was not aggrieved, or his rights affected by them.

At the term next after that in which his special plea was overruled, the defendant was tried upon the merits before another jury to which no objection was made, and during the trial he alleged numerous exceptions, which remain to be considered.

1. The admission of the statements of Emma L. Smith and Frances A. Chase, made in the presence and hearing of the defendant, was proper. The rule is, that a statement made in the presence of a defendant, to which no reply is made, is not admissible against him, unless it appears that he was at liberty to make a reply, and that the statement was made by such person and under such circumstances as naturally to call for a reply, unless he intends to admit it. But if he makes a reply, wholly or partially admitting the truth of the facts stated, both the statement and the reply are competent evidence. *Commonwealth v. Kenney*, 12 Met. 235; *Commonwealth v. Galavan*, 9 Allen, 271. In this case, when Emma L. Smith and Frances A. Chase stated that the defendant had performed an operation on them, he did not remain silent, but asked them in reply if they had been previously operated upon by another person. The jury

might infer from this an admission by him of the truth of their statements. The facts that the defendant was under arrest, and was taken by the officer to their presence, do not destroy the competency of the evidence. It follows that the court properly refused the seventh and thirtieth prayers for instructions.

2. The "speculum chair," and other surgical instruments adapted to use in producing abortion, found in the possession of the defendant, were properly put in evidence, for the same reasons that, upon a trial for burglary, implements of burglary found in the defendant's possession are admissible. They tend to show that the defendant had the means and opportunity to commit the offence charged. The fair inference to be drawn from the evidence was for the jury, and it was submitted to them with proper instructions. It was clearly competent for medical experts to testify that the instruments found were adapted to produce abortion, that being a matter within their special experience, and beyond the range of general knowledge.

3. The refusal of the court to allow the defendant to read to the jury books of medical authorities was in accordance with the well settled practice in this commonwealth. *Commonwealth v. Sturtivant*, 117 Mass. 122, and cases cited.

4. The rulings of the court refusing to give various instructions requested by the defendant were correct. There was evidence tending to prove all the allegations of the first and fourth counts, upon which alone the defendant was convicted.

The eighth, ninth, thirteenth, fourteenth, fifteenth, eighteenth, twenty-second, twenty-third, twenty-sixth, twenty-seventh, and twenty-eighth prayers for instructions are requests to the court to instruct the jury upon matters of fact, and were properly refused.

The instructions requested in the twentieth and twenty-fifth prayers were given in substance by the presiding justice, who was not bound to adopt the precise words of the defendant. *Brown v. Pease*, 104 Mass. 291, 308. Nor was he required to instruct the jury in the words of the twenty-ninth request, that the testimony of the two women who, at their own request, were operated upon by the defendant, was to be taken with "great circumspection and caution and discredit." He properly left the fact of their complicity in an unlawful act to be considered by the jury "as affecting their credibility as witnesses and the force and weight of their testimony." It was for the jury, and not for the court, to say how far, under all the circumstances, they were to be believed.

The instructions given contain no error of law, and were appropriate to the facts of the case.

5. The motion to quash the indictment and the motion in arrest of judgment were properly overruled. The several counts allege with certainty all the facts which constitute the offence described in the statute.

The objection that the indictment is bad because more than one offence is joined in it cannot be sustained. It is settled in this commonwealth that several offences may be charged in the same indictment when they are of the same general nature, and when the mode of trial and the nature of the punishment are the same. *Carlton v. Commonwealth*, 5 Met. 532;

Booth v. Commonwealth, 5 Met. 535; *Josslyn v. Commonwealth*, 6 Met. 236; *Commonwealth v. Costello*, 120 Mass. 358.

Exceptions overruled.

SUPREME COURT OF RHODE ISLAND.

[MARCH, 1877.]

MORTGAGE. — POSSESSION BY MORTGAGEE WITH ASSENT OF MORTGAGOR VESTS TITLE WITHOUT OTHER CONVEYANCE.

COOK v. CORTHELL.

Although a mortgage of personal property to be subsequently acquired is in itself ineffectual to vest in the mortgagee a legal title to the property, yet if after acquisition by the mortgagor the mortgagee by delivery from, or by consent of, the mortgagor, takes possession of the property under the mortgage conveyance, the title to the property both in law and equity vests in the mortgagee without further conveyance or bill of sale.

THE facts are stated in the opinions.

Lorin M. Cook & Nicholas Van Slyck, for plaintiffs.

B. N. & S. S. Lapham, contra.

DURFEE, C. J. We think it is well settled that, though a conveyance of personal property, to be subsequently acquired, is *per se* ineffectual to transfer the legal title to the grantee, yet, if the grantor delivers the property when acquired to the grantee in fulfilment of the conveyance, or allows him to take possession under the conveyance, the property thereupon passes and vests according to the terms of the conveyance both at law and in equity. There is no need of any new conveyance or bill of sale; for the property, being personal, passes by delivery. And there is no need of the intervention of a court of equity to treat the conveyance as an executory contract and decree its specific performance; for, looking at it in that light, the contract is specifically performed by the parties themselves. The cases which recognize or sustain this view are numerous. The most prominent of them are cited in *Williams v. Briggs et al.* There was therefore no error in the ruling mainly relied on as a ground for new trial. And in regard to the other rulings alleged to be erroneous, we do not think the petition discloses any sufficient reason for a new trial.

The petition assigns as a final ground that the verdict is against the evidence. The brief makes no point under this head, and no point was made at the hearing. We therefore presume that the petitioner did not expect to have the ground considered.

A majority of the court thinks a new trial should be denied.

POTTER J., dissenting. This is an action on the case for book account. The writ was served January 2, 1874, by attaching certain goods and the defendant's interest in a lease, and a copy was left with the defendant

"for the purpose of notifying him of the pendency of this suit." The goods were advertised and sold under the statute.

The defendant pleaded that the property in the goods was not in the defendant; that the only service was by attachment of said goods, specially setting out a mortgage given by him thereon to one Almy, October 28, 1872; and that on the 1st day of January, 1874, the said Almy took possession thereof and was in possession thereof at the time of said pretended service. The plaintiff traverses.

The mortgage was recorded the day of its date. It conveys "all and singular the stock in trade and fixtures now in or about the store No. 147 now occupied by me, such stock in trade consisting of boots and shoes and such other articles as are usually for sale in or about a boot and shoe store, together with all additions or renewals of said stock in trade hereafter made by me from time to time." It contains a provision that possession shall be retained by the mortgagor until default made in the mortgage covenants, unless attachments are levied on the property, and it gives power to sell on default.

It appeared in evidence that all the goods attached, except some worth about \$100, were acquired after the date of the mortgage.

On the 31st of December, 1873, two days before the attachment, Almy took a witness with him, went to defendant's store, and told him that under the power in the mortgage he took possession to get his debt, and made an entry to that effect in the defendant's cash book, told defendant he wanted him to sell the goods and pay him the money, and appointed him his agent for that purpose. Almy took one key and the defendant kept the other. Almy sold the fixtures and received some money from the defendant for sales. The plaintiff requested the judge to charge, that if Almy took possession under the mortgage of the property subsequently acquired, that all such property so subsequently acquired was subject to attachment. The judge refused so to charge. But the court did charge that if the jury found the mortgage valid, and Almy took possession under the power with the consent of the mortgagor and held possession, the mortgagee's title in the property attached covered by the mortgage would be valid, even if acquired subsequently to the execution of the mortgage, and the attachment would be invalid.

The point is also made that the verdict, which was for the defendant, was against the evidence.

The questions thus raised are the nature of Almy's interest, if any, in the subsequently acquired property; the nature of the delivery of possession necessary in such cases; whether any possession was taken of said property by Almy which should be considered effectual in law; and whether the verdict on that point was or was not against the evidence.

The old doctrine of the common law undoubtedly was that a person could not mortgage an article not owned by him at the time or not in existence.

But like all the old doctrines, it has been extended from time to time by the courts to do equity in new classes of cases as they arose; so that gradually a mortgage has come to be held to cover additions made to unfinished articles, to complete them, or to repair or to improve their condition; *Jenckes, Adm'r, v. Goffe*, 1 R. I. 511; *Harding v. Coburn*, 12

Metc. 333; the increase of stock described in the mortgage, wool growing or to grow on sheep then owned by the mortgagor; *Forman, &c. v. Proctor*, 9 B. Mon. 124; *Southworth v. Isham*, 3 Sandf. S. C. 448, 451; crops growing, or sown or to be sown; *Cudworth v. Scott*, 41 N. H. 456; *Butt v. Ellett*, 19 Wall. 544; what the grantor has potentially though not actually; *Grantham v. Hawley*, Hob. 132; goods joined with other goods by intermixture or confusion; *Dunning v. Stearns*, 9 Barb. S. C. 630; *Willard v. Rice et al.* 11 Metc. 493; *Hamilton v. Rogers*, 8 Md. 301; additions purchased with the proceeds of the mortgaged property, and to replace it and articles exchanged for the articles mortgaged; *Abbott v. Goodwin*, 20 Me. 408; *Holly v. Brown*, 14 Conn. 255; *Oliver v. Eaton*, 7 Mich. 108; *Head v. Goodwin et al.* 37 Me. 181; but see the subsequent cases in Maine, *Pratt v. Chase*, 40 Me. 209; *Chapin v. Cram*, 40 Me. 561.

The cases in which such questions generally arise are as to second incumbrancers, attaching creditors, and assignees in bankruptcy.

In England the old common law doctrine was for a long time adhered to even in equity; and after the courts began to change the law, to adapt it to the increase of commercial business and the necessities of modern society, there was for a long time quite a conflict of decisions, and much subtlety evinced in the reasons given for them.

Many of the decisions, even in equity, at first rested on the ground that the equitable interest created by mortgage would not prevail against creditors, unless possession was taken before the attachment.

But at last, in 1862, it was finally established as the doctrine in equity by their highest judicial tribunal, that the equitable title is good without possession against an attachment; although without possession or notice it would not be good against a *bond fide* purchaser or incumbrancer for value, and this equitable title is protected by injunction when necessary. *Holroyd v. Marshall*, 10 H. L. 191, A. D. 1862, was a thoroughly considered case. In that case the agreement provided that the future acquired property should be subject to the trusts of the mortgage; but the equitable assignees had done nothing to perfect their title, and execution was levied on the property. This case was the first heard by Sir John Stuart, V. C. 2 Giff. 382, whose decision was reversed by Lord Chanc. Campbell, on the ground that there was no "*novus actus interveniens*," to use Lord Bacon's language,—no possession taken. 2 De G., F. & J. 596. The House of Lords reversed the decision of Lord Campbell, 10 H. L. 191, holding, after a thorough examination of the cases, that if a person for consideration agrees to mortgage property of which he is not the possessor but afterwards becomes possessed, the court would compel a specific performance, and the beneficial interest would pass to the mortgagee, and the mortgagor would immediately become a trustee for the mortgagee, and if the mortgagor had attempted to remove the new machinery he would be enjoined from doing it. See opinions of Westbury, 10 H. L. 209; Wensleydale, 10 H. L. 213; and Chelmsford, 10 H. L. 214. From Lord Campbell's opinion, 2 De G., F. & J. 596, 601, it would seem that the mortgagees at first claimed that they had possession, but had not been able to prove it to the satisfaction of the court.

It was admitted at the hearing that the attaching creditor must take

subject to all the equities attached to the property; 10 H. L. 215; and it was held that the equitable title should prevail without any regard to notice. 10 H. L. 227.

Bispham (Equity §§ 165, 358) says the opinion existed and prevailed for some time that the equitable right would be incomplete without subsequent possession or some equivalent act, and that Lord Bacon's maxim in regard to legal assignments was also applicable to equitable assignments; that Lord Campbell, on this idea, decided the case of *Holroyd v. Marshall*, but the House of Lords reversed his decision. The true ground, he says, appears to be, "that a court of equity enforces such assignments, on the ground that the assignee is entitled to have immediate specific performance as soon as the property comes into existence. Neither in equity nor at law can such a contract operate as an immediate alienation, for there is nothing to transfer. But immediately on acquisition the assignor holds it in trust for the assignee, whose title requires no act on his part to protect it, and cannot be disturbed by an execution creditor of the assignor. The assignee, however, has an equitable title from the time of the assignment." This doctrine "is of great practical importance. If the right of the assignee rises (as it is here conceived it does) to the dignity of a title to the specific property," it cannot be defeated by an assignee in bankruptcy, &c., &c.

In this country, while in Massachusetts and in some other states they have held to the common law doctrine, not perhaps always consistently, in other states and in the United States courts the doctrine of the case of *Holroyd v. Marshall* has been gradually prevailing in equity.

Here, as in England, many of the decisions at first rested on the ground that the equitable interest created by the mortgage would prevail provided possession was taken before attachment; but the later decisions, and of courts whose opinions are entitled to most weight, have held the taking of possession unnecessary as against an attaching creditor. In *Mitchell v. Winslow et al.* 2 Story, 630, Story, J., after citing with approbation the case of *Langton v. Horton*, 1 Hare, 549, as entirely satisfactory and conclusive, states, as the clear result of the authorities, "that wherever the parties by their contract intended to create a positive lien or charge, either upon real or personal property, whether then owned by the assignor or not, or of personal property, whether it is then *in esse* or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto, against the latter and all persons asserting a claim thereto under him either voluntarily or with notice or in bankruptcy." 2 Story, 644. In this case the mortgagee had taken possession, but the decision does not at all rest on that ground.

In *Smithurst v. Edmunds*, 14 N. J. Eq. 408, May, 1862, the lessee of a hotel assigned and covenanted to assign to the lessor the furniture in the hotel and all other which he should purchase and place there, as security, &c., and covenanted that it should remain in the hotel as security, &c. A sheriff levied on the furniture for debt, and an injunction was issued to restrain the sale. The court of chancery, after saying that so far as the after acquired property is concerned the instrument cannot operate as a pledge, because the property was not delivered to the pledgee, nor as a

legal mortgage, proceeded to consider whether it could be upheld as an equitable mortgage, and came to the conclusion that it should be. The agreement that the property should be kept on the premises during the term may have had some influence on the decision; but the decision of Judge Story, in *Mitchell v. Winslow et al.* 2 Story, 630, is quoted with full approbation, and the court after full argument refused to dissolve the injunction.

Our American courts have had no difficulty in giving this effect to railroad mortgages of after acquired property.

In *Morrill v. Noyes*, 56 Me. 458; 3 Am. Law Reg. N. S. 18, there was a mortgage of road with cars then owned or afterwards purchased. Two years afterwards more cars were purchased and a second mortgage made.

In their opinion the court say: "Some of the courts . . . have attempted to reconcile the cases on the ground that such a mortgage, though void at law, is valid in equity. But this is a loose use of language that tends more to confuse than to reconcile. If such a mortgage is absolutely void for want of any subject matter to support it, then it should be held so in equity as well as at law." 56 Me. 465. The ordinary syllogism, *Qui non habet ille non dat*, does not settle the question. Many of these mortgages which have been held void at law would have been held void in equity also for uncertainty of description. To be upheld, the contract should refer to some particular property reasonably certain to come into existence, so that the minds of the parties may be in accord as to what it is to be, and the mortgagor must have a present interest in or concerning it. 56 Me. 465, 466. The court sustains the mortgage, giving for one reason among others that the property may be considered as an appurtenance of the road necessary for its use, citing *Pierce v. Emery*, 32 N. H. 484; *Seymour v. Canandaigua & Niagara Falls R. R. Co.* 25 Barb. S. C. 284; *Farmers' Loan & Trust Co. v. Hendrickson*, 25 Barb. S. C. 484; *Coe v. Hart et als.* 6 Am. Law Reg. 27; *Pennock v. Coe*, 23 How. U. S. 117; *Phillips, &c. v. Winslow*, 18 B. Mon. 431; and Judge Redfield, in a very long and able note classifying the cases, approves the decision. 3 Am. Law Reg. N. S. 18, 30. In *Pennock v. Coe*, 23 How. U. S. 117, the opinion was delivered by Nelson, J., one of the ablest of the older judges. Judge Nelson, 23 How. U. S. 130, refers to *Tindal, C. J.*, in *Tapfield v. Hillman et als.* 6 M. & G. 245, as being of opinion that even at law effect might be given to a mortgage of future acquisitions if the words indicated an intention to include them.

And in the case of *Barnard et al. v. Norwich & Worcester R. R. Co.*, in the U. S. Circuit Court, 1st Circuit, September, 1876, where the mortgage to trustees included railroads to be built under powers already or thereafter to be obtained on specified lines, with all engines, machinery, &c., then owned or thereafter acquired, Clifford and Lowell, JJ., relying on *Pennock v. Coe*, 23 How. U. S. 117, and *Mitchell v. Winslow et als.* 2 Story, 630, held that the rules established by those cases were sound and supported by other decisions; and held that the contract attached in equity as a lien or charge on the property as soon as acquired, so that it was good in this case against the assignees in bankruptcy.

In the case of *Brett v. Carter*, in the U. S. District Court, Mass. Dis-

trict, 1875, Lowell, J., held a mortgage of after acquired property valid against the assignee in bankruptcy; 8 Central Law Journ. 286; and citing numerous cases, remarks: "It is true that many of the late cases have arisen upon mortgages given by railroad companies, and some few judges have founded a distinction upon that circumstance. But there is no difference in principle between a mortgage by such a corporation of its rolling stock not yet *in esse* and that by a trader of his future stock in trade in a particular shop, and none can be successfully maintained." From their magnitude, attention has been called to the great injustice that would be done in displacing the first mortgage in favor either of general creditors or even of subsequent mortgagees. But the injustice exists in all such cases in less degree.

The case of *Leland et al. v. Collyer et al.*, supreme court of Michigan, reported in the Central Law Journal, October, 1876, was a suit in trover, where the defendants justified under a chattel mortgage which allowed the mortgagor to sell the goods and with the proceeds buy other goods, and included all the stock he then had or might from time to time have in trade, giving to the mortgagee a right to enter, &c., in case, &c. The court, consisting of some of the ablest judges in the country, observe that trusts of personal property are of every day occurrence, where the fund is constantly changing, and is still held subject to the trust,—for example, partnerships; and hold that this changing stock of goods is like a trust fund which a court will pursue into reinvestment against purchasers with notice when it can be identified, and that subsequent purchasers with notice could be held trustees.

The mortgagor in this case had sold out his stock to the plaintiffs, specifying it to be subject to a chattel mortgage, but not naming the mortgagee, and the defendants seized and sold under their mortgage.

We have thus the weight always due to the decisions of the United States supreme court, with the separate opinions of Story, McLean, Clifford, Lowell, and Cooley, &c., in favor of the doctrine as I have stated it.

The provisions of the mortgages that have come before the courts are various.

Instruments containing a power to seize but without any words of transfer, have been held not to give any rights in the property before seizure; *Holmes v. Hall*, 8 Mich. 66; *Dalton v. Laudahn*, 27 Mich. 529; and in *Reeve v. Whitmore*, 4 De G., J. & S. 1, Lord Chancellor Westbury held that a mortgage of existing chattels, with license to the mortgagee to enter and seize after acquired chattels, does not give the latter any present equitable interest. It would have done so if it could be implied from the instrument that he should have a security attaching immediately to the future acquired chattels; but a mere power to seize is very different from an interest, and no interest will arise until the power is exercised. And it may be implied from the lord chancellor's language that if the contract could be construed to convey a present interest, the power to seize would be unnecessary.

Some cases, however, hold that the power to take possession might be implied as necessary to carry out the contract.

It will be observed that in some of the cases (*Langton v. Horton*, 1

Hare, 549) possession had been taken of the property subject to the equitable charge, but that in other cases there was no possession taken before the attachment. In *Mitchell v. Winslow et al.* 2 Story, 680, Story, J., decides the case without any reference to that fact. In *Abbot v. Stratton*, 9 Ir. Eq. 233; also in 3 J. & L. 603, before Lord Chancellor Sugden of Ireland, and in *Whitworth v. Gaugain*, 3 Hare, 416, before Wigram, V. C., affirmed on appeal by Lord Chancellor Lyndhurst, 1 Ph. 728, it was held that possession was not essential; and in *Holroyd v. Marshall*, 10 H. L. 191, it was held by the House of Lords that as between the equitable charge and a judgment creditor neither possession nor notice was essential.

It is difficult to see how taking possession can have any relation back to validate a void instrument. If such a mortgage is, as common law judges have held, void, the courts of Massachusetts have been consistent in holding (*Jones v. Richardson*, 10 Metc. 481) that even a taking possession to foreclose was of no effect; and that if it was to be construed as an agreement to mortgage, then (*Codman v. Freeman*, 3 Cush. 806) it could have no effect on the property until the new mortgage was given. Whereas, if, as the later cases hold, the mortgage of after acquired property is to be construed as creating an equitable interest in it as soon as acquired, the interest of the legal owner, while the property was still in his possession, might be attached subject to this equity; while the court would enjoin a sale if it would cause a sacrifice of the property or defeat the object of the contract. *Pennock v. Coe*, 23 How. U. S. 117; *Smithurst v. Edmunds*, 14 N. J. Eq. 408.

It is difficult to see why, if a mortgage on the after acquired personal property of a railroad is held good, the same principle should not apply to other personal property.

The practical difficulties of the law as laid down in the later decisions are no greater than under the law as formerly understood and construed by the common law courts. In case of mortgage of the smaller stock used in ordinary business, there will be no danger of innocent purchasers suffering; as, if a power to sell and exchange is not given in or implied from the instrument itself, the consent of the mortgagee would ordinarily be implied from a known course of dealing. And if the mortgagor sells the mortgaged property in the lump, or mortgages for a new and valuable consideration to a person who has no notice, the sale or second mortgage would on all sound principles be good; and if the purchaser or second incumbrancer has notice it ought not to be good.

There are questions of fraud growing out of secret delivery of possession, agencies, &c., &c., which under any law would always arise.

But the main object is attained when a purchaser for value, or second incumbrancer for value and without notice, is protected.

A person who advances money or furnishes materials may require security, and then if without notice would be protected in equity. But if he chooses to trust to the personal security or honor of the debtor, then there cannot be said to be any peculiar hardship which should entitle him to preference. See remarks of McLean in *Pennock v. Coe*, 6 Am. Law Reg. 27; 2 Redfield R. R. Cases, 667.

And with the decisions of the highest courts in England, and many of

the courts of the highest standing in this country, the weight of authority is most decidedly in favor of the doctrine, that in such a case the equity attaches as soon as the property intended is acquired, and that no possession is necessary except as against a *bond fide* purchaser for value and without notice.

The rule has been laid down, and there is sound sense in it, that the property must be so described as to be identified either by the sort or locality or both, and the question of intention to defraud would be always open.

In *Belden et al. v. Read*, 3 H. & C. 955, A. D. 1865, which was trover by an assignee, A. conveyed all his personal property now or hereafter to be upon or about his dwelling-house, farm, or elsewhere in Great Britain. It was decided, partly on the ground that the power to seize given by the mortgage required a previous demand which had not been made, and partly on the ground that the property had never become so specific as to be the subject of specific performance; whereas in *Holroyd v. Marshall*, 10 H. L. 191, the property was new machinery brought into a mill and added to the old machinery, and sufficiently ear-marked to determine it.

And the case of *Mogg et al. v. Baker*, 3 M. & W. 195, so often cited, seems to have been decided partly on the ground of the indefiniteness of description, and partly on the ground that it was not a general transfer, but only an agreement to give a mortgage. See 10 H. L. 191, 219.

Another question now arises, What interest did the attaching creditor take in this property so situated?

That assignees in insolvency and bankruptcy take no more interest in the property than the debtor himself had, and take it subject to all equities, is generally acknowledged. See cases cited in 1 Amer. Lead. Cases, 52.

And it is laid down in the text books, and is fully supported by the authorities, that in regard to personal property an attaching or judgment creditor stands in the same light. He has not the rights of a purchaser for value *bond fide* without notice. He takes subject to all equities as well as legal rights. And many cases extend the same doctrine to real estate; *Drake on Attachment*, §§ 223, 245, 527, 610; 1 Amer. Lead. Cases, 52, and cases cited; that an equitable mortgage takes precedence of a *bond fide* judgment debt, is stated by Lord Chancellor Sugden in *Abbot v. Stratten*, 3 J. & L. 603, 614, to have been considered as always settled, until some doubts were thrown upon it by *Whitworth v. Gaugain*, Cr. & Ph. 325; 1 Ph. 728. But in the same case, in 3 Hare, 416, Wigram, V. C., says that Lord Cottenham never intended to decide contrary to the common doctrine. In that case Wigram, V. C., holds in strong language that the judgment creditor takes only the interest the defendant has and subject to the equitable mortgage; and on appeal his decision was confirmed by Lord Chancellor Lyndhurst. 1 Ph. 728. And in these cases there was no possession taken or notice of the equity.

In *Abbot v. Stratten*, 3 J. & L. 603, Lord Chancellor Sugden considers the equitable mortgagee as *pro tanto* a purchaser, and sustains his claim against the judgment creditor. No question was made as to possession.

And in the thoroughly considered case of *Holroyd v. Marshall*, 10 H. L. 191, 215, 219, it was taken as settled law, both by the court and counsel, that the judgment creditor took only the right the defendant had; and they overruled Lord Chancellor Campbell's decision, that the equitable right was not complete against creditors until possession taken, thus following and confirming the other cases: and see *Newlands v. Paynter*, 4 M. & C. 408; *Lodge v. Lyseley*, 4 Sim. 70; *Smithurst v. Edmunds*, 14 N. J. Eq. 408, which concedes that the mortgagor's right might be levied on, though in the circumstances of the case the property, which was hotel furniture, was protected by injunction from a sale. *Snell's Equity*, 67; *Beavan v. Earl of Oxford*, 6 De G., M. & G. 507; *Willard's Eq. Juris.* 442; *Langton v. Horton*, 1 Hare, 549, 560; *Brown v. Bateman*, L. R. 2 C. P. 272, 281, 283.

Lanfear v. Sumner, 17 Mass. 110, is sometimes cited as an authority for holding that an attaching creditor is a purchaser for value. It is indeed so stated; but the holding is not necessary to the decision of the case, which was between two creditors as to which should succeed in getting the property. One got an assignment of the property to him, the other attached. In neither case was there any new consideration. The notes of the annotator, Mr. Rand, plainly show that the decision is of very little authority. See, also, *Greene & Co. v. Haskell et als.* 5 R. I. 447; and as to what makes a man a purchaser for value, &c., *Bay v. Coddington et als.* 5 Johns. Ch. 54; *Coddington et al. v. Bay*, 20 Johns. Rep. 637, 645, 651.

To apply the principles I have laid down to the present case:—

There is here no objection arising from indefiniteness in describing the property or locality.

So far as the property existing at the date of the mortgage is concerned, the mortgage being recorded, it could only be attached in the cases mentioned in the statute.

As to the remainder, if possession was actually taken, then it would be ordinarily protected from an ordinary attachment, either as a pledge, or as an equitable right transmuted into possession.

But if no possession was taken, then, on the authorities I have cited, it would be good as a contract of which specific performance could be enforced, and the defendant would become trustee of the goods as fast as acquired for the benefit of the mortgagee.

In this case, if we are to hold the mortgage invalid in law and only valid in equity, the legal title to the goods would be still in the mortgagor, and attachable. Such an attachment would not be an attachment of an equity, but of the legal title subject to an equity, and this raises the question whether there was any actual possession taken by Almy.

The judge left this question to the jury, and they found that possession had been taken. But it seems to me to be plainly not only against the weight of evidence, but to be entirely unsupported by evidence.

The only evidence on this point was what we have stated. If there was other evidence counsel have not reported it. While there was no attempt at secrecy, there was no publicity, or attempt at publicity. There was no visible change of possession, and nothing whatever to give notice. An officer might reasonably suppose that the property was as liable to

attachment as it ever had been. In *re Blenkhorn*, A. D. 1874, 22 W. R. 907, a creditor took possession of personal property under his mortgage, and put a bailiff there, but otherwise everything went on as before, and apparently the debtor was in possession. It was held that such possession did not avail the creditor, and the property passed to the assignees in bankruptcy; and although decided under the English Bankrupt Law, the principle seems to be a sound one, and of more general application; and see *Latimer v. Baston*, 4 B. & C. 652.

The policy of the law, I think, requires, and without any regard to fraudulent intent in the particular case, that the possession should be such as to give notice to those doing business with the parties that a change had been made.

And in this respect the verdict is entirely against the evidence, and should be set aside. *New trial refused.*

NOTE BY THE REPORTER. — The foregoing case was assumpsit brought in this court, the writ being served by attachment of personal property covered by a mortgage to one Darwin Almy. The defendant pleaded, in abatement, no service of writ, which plea the plaintiff traversed. Gen. Stat. of R. I. cap. 197, § 4, provides that "Personal estate, when mortgaged and in the possession of the mortgagor, and while the same is redeemable at law or in equity, may be attached on mesne process against the

mortgagor, in the same manner as his other personal estate."

The case was submitted to a jury to determine the defendant's title to the mortgaged property, and the jury found, "that at the time of the service of the plaintiff's writ the property of the goods and chattels attached by virtue of said writ was not in the defendant, but in one Darwin Almy, mortgagee." The charge of the court, and the evidence, are stated above by Mr. Justice Potter.

COURT OF APPEALS OF VIRGINIA.

(To appear in 26 Grattan.)

REMOVAL OF CAUSES. — DOMICIL OF CORPORATION. — WHEN REMOVAL MAY BE MADE.

CONTINENTAL INS. CO. v. KASEY.

The words "final hearing or trial," in the Act of Congress of 1867, prescribing the conditions touching the removal of causes, require the application for removal to be made before "*trial*" in actions at law and before "*final hearing*" in suits in equity. Such application will not be allowed after the applicant has elected to stand a trial in the state court, if such trial is not final.

A foreign insurance corporation which has complied with the laws of Virginia is domiciled there, and is not a citizen of another state in matters of controversy with citizens of Virginia. It must sue and be sued in the state courts, and does not come within the act of Congress relating to the removal of causes.

Griffin & Bro., for appellant.

James F. Johnson, contra.

CHRISTIAN, J. The record in this case presents for our consideration a single question, and that is whether, under the acts of Congress relating to the removal of causes from state courts to the circuit courts of the United States, the appellant had the right to remove its case from the

circuit court of Roanoke to the circuit court of the United States in the judicial district in which the county of Roanoke was situate.

The appellant, the Continental Insurance Company of the city of New York, having its home office in said city of New York, but doing business in the State of Virginia, under the conditions and requirements of the statute law of this state, was defendant in a certain action at law brought by Thomas A. Kasey upon an insurance policy issued by said company, insuring against fire a certain building belonging to said Kasey.

Kasey, at the April term of the circuit court of Roanoke, 1873, recovered a judgment against said company. To that judgment a writ of error was awarded by one of the judges of this court.

Upon this writ of error the case was heard at Wytheville, in July, 1874, and this court reversed the judgment of the circuit court, and remanded the case for a new trial, to be had in said circuit court of Roanoke. This reversal was in favor of the Continental Insurance Company. But when the case came on again, to be heard in the circuit court of Roanoke, upon the new trial awarded by this court, the company by its counsel filed the following petition:—

“To the honorable, the judge of the circuit court of Roanoke County.

“The petition of the Continental Insurance Company of the city of New York respectfully represents that it is a foreign corporation, created and having its place of business in the State of New York, and in legal contemplation is a citizen of that state; that it is sued in your honor’s court by one Thomas A. Kasey, a citizen of the State of Virginia, upon a contract of insurance; that the matter in dispute in said suit exceeds the sum of five hundred dollars, exclusive of costs, and that there has not been a final trial of said cause. Your petitioner is advised that under the laws of Congress in such cases made and provided, it has the right to have said cause removed into the circuit court of the United States for this judicial district, and it hereby offers good and sufficient surety for its entering copies of the papers in that court on or before the first day of the next term thereof, and it prays your honor that a removal of said cause may be directed.

“The Continental Insurance Company of the city of New York. By counsel.”

This petition was accompanied by the following affidavit:—

“State of Virginia, Roanoke County, to wit: I, P. H. Gibson, agent and attorney of the Continental Insurance Company of the city of New York, do solemnly swear that I have reason to, and do believe that from prejudice or local influence, the said Continental Insurance Company of the city of New York will not be able to obtain justice in the circuit court of Roanoke County, in the suit now pending in said court, in which Thomas A. Kasey is plaintiff, and the said Continental Insurance Company of the city of New York is defendant. P. H. Gibson.

“Subscribed and sworn to by P. H. Gibson, before me, F. Johnston, a notary public for the State of Virginia.

“Given under my hand, this 11th day of November, 1874. F. Johnston, N. P.”

The circuit court of Roanoke denied the prayer of the petition, and refused to order the removal of the case to the circuit court of the United

States. To this ruling of the court the company excepted, and obtained a writ of error, which brings up the question to this court.

There was a judgment in the court below against the company for the sum of \$4,950.50, but against this judgment no other error is assigned, and the whole case here turns upon the single question whether the circuit court erred in refusing to remove the case upon the petition of the company, and the affidavit of its agent, to the circuit court of United States.

The solution of this question depends, 1st, upon the true construction to be given to the acts of Congress relating to the removal of causes from the state courts to the United States courts; and 2d, upon the effect of the statute law of this state imposing certain conditions and requirements upon foreign insurance companies doing business in this state.

First, as to the true construction to be given to the acts of Congress in reference to the removal of causes.

This motion is made under the provisions of an act of Congress approved March 2, 1867, which declares that in a controversy between a citizen of a state in which suit is brought, and a citizen of another state, where a party shall make and file an affidavit, stating that he has reason to and does believe that from prejudice or local influence he will not be able to obtain justice in such state court, may at any time before final hearing or trial of the suit file a petition for removal of the suit into the next circuit court of the United States for the district in which the suit is pending. And then declares that upon giving certain security, the state court shall proceed no further in the suit. See 14 United States Statutes at Large, 558, 559.

It would seem sufficient to say that this court has already, by its unanimous judgment, construed this act of Congress against the pretensions of the appellant in this case. In *Breery v. Drick*, 22 Grat. 489, this court, construing this same act, says: "The question we have to consider is, was the application (for removal of the case) made before the final hearing or trial, within the meaning and intent of the acts? The word 'final' in the act applies to and qualifies the word 'hearing,' and not the word 'trial.' In the Act of 1866, the language is, 'before trial or final hearing.' The transposition of the words in the Act of 1867, so as to read 'before final hearing or trial,' was probably accidental, and not effecting nor designed to effect any change in the meaning. The words 'final hearing' are ordinarily applied to cases in equity, while the word 'trial' is applied to actions at law. The obvious and unmistakable intention of the statute was to require a party desiring a removal of his case to make his application before a 'trial' in actions at law, and before a final hearing in suits in equity. . . . 'It certainly never was the object of the act of Congress to provide for a review of the decisions of a state court, but simply for the exercise of an election by a party to a suit in a state court to transfer it to another court of original jurisdiction for trial. The design manifestly was to give him an election between two tribunals, not to give him a chance at both. Any other construction would be to confer upon the federal court, whose jurisdiction is carefully limited by the Constitution of the United States, an extraordinary and incongruous appellate jurisdiction, by which the judgment or decree of a

state court solemnly pronounced, in a case where it had the undoubted jurisdiction, could be reviewed, reversed, and annulled by a federal court. . . . Such unprecedented and dangerous jurisdiction in the federal courts will never be recognized by this court, unless the very letter of the law imperatively requires it, and unless such law, if enacted by Congress, shall be declared by the supreme court of the United States to be consonant with the Constitution, which expressly limits the jurisdiction of the federal courts."

This was the construction of the Act of 1867, and these the views expressed by this court in 1873, in my opinion in *Breery v. Drick*, *supra*.

I might be content to rest this case upon that opinion, but that the able counsel for the appellant, in an argument of much learning, has called upon us to review our opinion in that case, and relies especially upon a recent decision of the supreme court of the United States, *Dunn v. Ins. Co.*, which is certainly adverse to our construction of the Act of 1867.

That decision, adopting as its rule of construction the literal interpretation of the words of the act, declares that a party may at any time before a final trial remove his case upon proper affidavit and security. He may take his chances before a state court; may go up to the supreme court of the state, and take his chances there; and then, after years of litigation in the state courts, which have the unquestioned jurisdiction of his case, and to whose jurisdiction he has voluntarily submitted, may, at any time before his case is finally tried, remove it to a circuit court of the United States. Now while I have great respect for the decisions of the supreme court of the United States, — and the decisions of that august tribunal are always recognized as very high authority in this court, — I cannot follow that court in the construction which it has given to the act of Congress under consideration, — especially, since the decisions of every state in the Union where the question has come up, except the State of Rhode Island, has given a different construction of the act. Certainly the supreme courts of the states of Massachusetts, Ohio, Wisconsin, Maryland, and Virginia have united in declaring that the application for removal of a case to the circuit court of the United States must be made before trial; and that after the trial is had in a state court, the case cannot be removed. See *Galpin v. Critchlow*, 112 Mass. 339; *Home Ins. Co. v. Dunn*, 20 Ohio State Rep. 175; *Aberly v. Vilas*, 24 Wisc. 165; *Adams Express Co. v. Trego*, 35 Maryland, 47; *Breery v. Drick*, *supra*.

In ascertaining the true interpretation of the words "before final hearing or trial" in this act, we may properly refer to the earlier acts of Congress on the subject of removing causes from the state courts to the circuit courts of the United States, as constituting parts of our judicial system. Under the first judiciary act of the United States, where the removal is claimed upon the ground that the defendant is an alien or citizen of another state, the right can only be exercised "at the time of entering his appearance," and not "afterward," even with the assent of the state court. 1 U. S. Stat. at Large, 79; *Gibson v. Johnson*, Pet. C. C. 44.

So under act of Congress, passed during the War of 1812, as to officers, civil or military, when sued in a state court for acts done by virtue of such office, he might remove case to United States court, "at the time of

entering his appearance." 3 U. S. Stat. at Large, 198, 200-396; 14 Mass. 212.

So also the right of removing an action pending in a state court, between citizens of the same state claiming lands under grants of different states, must be exercised by either party "before the trial." 1 U. S. Stat. at Large, 80.

So also in suits against revenue officers brought in state courts for acts done by virtue of their office, the case could be reviewed "at any time before trial." 4 U. S. Stat. at Large, 683.

So also by the Act of Congress of 1863, chapter 81, § 5, in a suit against any military or civil officer, for acts done as such, he might, "at the time of entering his appearance," remove a case from a state court to a circuit court of the United States. 12 U. S. Stat. at Large, 756.

So also by Act of 1865, it was declared that the right of removing such causes should be exercised "before a jury is empanelled to try the same."

The Act of 1866 provides that under its provisions a cause may be removed "at any time before trial or final hearing."

Now this review of the previous legislation on the subject shows that up to 1867, certainly, there was no authority for removing from a state court to a federal court any case whatever in which a trial on the merits had commenced.

Now the question is, does the Act of 1867, by simply transposing the word "final," placing it before the word trial, as well as hearing, so as to make it read "final hearing or trial," instead of "trial and final hearing," reverse the whole policy of the law as plainly declared in all the acts of Congress on the subject from 1789 to 1866 inclusive? and by this slight transposition (accidental no doubt) of a single word, confer upon the federal courts this extensive, all pervading, and dangerous jurisdiction, which would constitute the federal courts appellate tribunals to the state courts. I cannot arrive at this conclusion, even if I have to disregard a decision of the supreme court of the United States. I prefer to follow the decisions of the state courts, and (adhering to my previous opinion in *Newton v. Brishong*, *supra*) aid them in checking the modern spirit now so often manifested, in which the United States courts are stretching out their hands to grasp the jurisdiction which, under the Constitution and under the ancient system of jurisprudence, belongs exclusively to the state courts.

It is worthy of note, in considering this question of construction of the Act of 1867, that since the decision of the supreme court of the United States in the case of *Insurance Co. v. Morse*, 20 Wall. 445, there has been a significant legislative construction by Congress of this very act. In 1874, there was a codification and revision of the acts of Congress, directed to be published, when completed, under direction of the secretary of state, and when promulgated by him to be accepted as the Revised Statutes of the United States. Accordingly, on the 2d of February, 1875, the Hon. Hamilton Fish, Secretary of State, issued his proclamation certifying the "Revised Statutes of the United States, enacted by Congress on the 22d day of June, 1874, were prepared, printed, and published, according to the provisions of the Act of June 20, 1874," and these Revised Statutes are now accepted and recognized as the Code of Revised Statutes of the United States.

In these Revised Statutes (p. 113), Congress has adopted the Act of 1866, and not the Act of 1867, containing the transposition of the word "final" before the words "trial and hearing," so that the provision of the act reads as follows: "*Third*. When the suit is between a citizen of the state in which it is brought and the citizen of another state, it may be so removed on the petition of the latter, whether he be plaintiff or defendant, filed at any time '*before THE TRIAL or final hearing*' of the suit, if before or at the time of filing said petition he makes and files in said state court an affidavit stating that he has reasons to believe, and does believe, that from prejudice or local influence he will not be able to obtain justice in such state court."

It will thus be seen that the revisers of the statutes concur in opinion with this court, and the other supreme courts of the states where the question has been considered, that the transposition of the word "final," in the Act of 1867, was merely accidental, and that the true construction to be given to the act, consonant with all the statute law theretofore enacted, and with the spirit of our system of jurisprudence, that the application for removal of a case from a state court to a federal court must be made before the trial of an action at law, and before the final hearing of a case in equity.

This view leads me confidently to the conclusion that the application for removal in this case came too late, and that the circuit court of Roanoke was not in error in overruling the plaintiff's motion.

But there is another view of this question, which, though not raised in the argument of the case here, is well worthy of consideration.

The question is this: Is the plaintiff (the Continental Ins. Co.) a citizen of another state in the meaning of the act of Congress?

I am aware that it has been held by the supreme court of the United States, that corporations of other states come within the purview of the act. That is the general principle, from which I express no dissent; but here is a New York corporation doing business in the State of Virginia, under the conditions and limitations prescribed by our statute. One of these conditions is that every such company, before they issue policies in this state, shall deposit with the treasurer of the state a certain fund, which is to remain in trust to meet the losses of citizens insured in such companies.

There is another most important condition imposed on all such companies, to wit, § 20, c. 56, Code 1873, p. 366: "Every such insurance company shall, by a written power of attorney, appoint some citizen of this commonwealth, resident therein, its agent or attorney, who shall accept service of all lawful process against such company in the commonwealth, and cause an appearance to be entered in any action in like manner as if such corporation had existed and had been duly served with process in this state."

The plain object of these provisions of our statute is to give to our citizens the privilege of suing these foreign corporations in the courts of the state.

This would be in the last degree a futile and incongruous provision of our law, if the privilege to sue in the state courts is to be at once defeated — if the corporation, as soon as suit is brought, may remove the

case to another and foreign jurisdiction. This would defeat the very object of the statute.

My own view is, that these foreign corporations are placed by our statute on precisely the same footing, *quoad hoc*, as the home companies; and that when they come into this state and accept the provisions of our statute law, they become domiciled here, and as to all contracts and obligations made and assumed under the provisions of our laws, they are no longer citizens of another state, but are subject to the laws to sue and be sued as citizens of this state.

The Continental Insurance Company, though chartered by the State of New York, when it commences business in this state and complies with the terms of the statutes of Virginia, by making necessary deposits and appointing an agent to accept process, becomes, as to all contracts with citizens of Virginia, domiciled here; and in controversies with our citizens growing out of policies of insurance, must sue and be sued in our state courts; and do not come within the terms or spirit of the act of Congress relating to the removal of causes from a state court to a federal.

Upon the whole, I am for affirming the judgment of the circuit court of Roanoke.

Judgment affirmed.

SUPREME COURT OF RHODE ISLAND.

[FEBRUARY, 1877.]

LIFE ASSURANCE POLICY A CHOSE IN ACTION.

CLARK v. ALLEN.

A life policy is a chose in action.

The sale and assignment of a life policy, outstanding and valid, and containing no prohibition of such alienation, is good in Rhode Island, though made to one who has no interest in the life insured, provided such sale and assignment is a *bonâ fide* business transaction, and not a device to evade the law.

Query. Whether in Rhode Island a person can legally take out an original policy on a life in which he has no interest?

Charles Hart, for plaintiff.

James Tillinghast, *contra*.

DURFEE, C. J. This is an action for money had and received, tried to the court, jury trial being waived. It appears that on the 26th December, 1868, one Edward T. Ross got his life insured for \$2,000, payable to his wife at his decease. His wife was a second wife. He had children by his former wife, but none by her. She died before him, August 21, 1871. He was then in infirm health and short of means. He did not pay one premium promptly. The company, however, accepted payment afterwards, and issued the policy anew payable to his legal representatives. On the 2d of January, 1872, he assigned the policy to the defendant, and received the defendant's note for \$125, which was paid April 10,

1872. The surrender value of the policy at the time of the assignment was \$118. The defendant was Ross's brother-in-law. After the assignment, which was assented to by the insurers, the defendant paid five quarterly premiums of \$25 each. Ross died March 24, 1873. The defendant collected on the policy \$2,121.20. The plaintiff, who is administrator on Ross's estate, brings this action to recover that amount, less the amount of the note for \$125, and the five quarterly premiums with interest.

The plaintiff claims that the assignment was made as security for a loan, and not as an absolute sale. Testimony was submitted on this point. We think the assignment was intended to be an absolute sale.

The plaintiff contends that, if the assignment was an absolute sale, it was void as against public policy, and that he is therefore entitled to recover the money received on it, less the payments aforesaid, as money received to his use. The defendant claims that the assignment, though absolute, is valid, and that he is entitled to keep the money as his own.

Upon the question thus raised there is a conflict of decision. In Massachusetts and Indiana, it has been decided that a life policy is not transferable outright to a person who has no interest in the life insured. *Stevens, Adm'r, v. Warren*, 101 Mass. 564; *Franklin Life Insurance Co. v. Hazzard*, 41 Ind. 116. A similar decision (but in a case having peculiar circumstances) has been made by the supreme court of the United States. *Cammack v. Lewis*, 15 Wall. 648. The reason given is, that it is unlawful for a person to procure insurance for himself on a life in which he has no interest, and that therefore it is unlawful for him to take an absolute assignment of a policy upon a life in which he has no interest; for otherwise the law could always be easily circumvented by first having a person get his own life insured and then taking an assignment of the policy. And it is also argued that the gambling or wagering element is the same, and the temptation to shorten the life insured is the same, in the one case as in the other. But, on the other hand, it has been decided in England that such an assignment is valid. *Ashley v. Ashley*, 3 Sim. 149, cited without disapproval by Chancellor Kent, in 3 Kent's Com. 369, note. The reason given is, that such an assignment is not within the prohibition of the English statute, 14 Geo. 3, cap. 48, and that the policy, being valid in its inception, is, like any other valid chose in action, assignable at the will of the holder, whether the assignee has an interest in the life insured or not. This view has been repeatedly affirmed in New York. *St. John v. Amer. Mutual Life Insur. Co.* 2 Duer, 419; also in 13 N. Y. 31, on appeal; *Valton v. Nat. Fund Life Assurance Co.* 20 N. Y. 32; and see *Cunningham et al. v. Smith's Adm'r*, 70 Pa. St. 450. We think the assignment was valid. A life policy is a chose in action, a species of property which the holder may have perfectly good and innocent reasons for wishing to dispose of. He should be allowed to do so unless the law clearly forbids it. It is said that such an assignment, if permitted, may be used to circumvent the law. That is true, if insurance without interest is unlawful; but it does not follow that such an assignment is not to be permitted at all, because, if permitted, it may be abused. Let the abuse, not the *bond fide* use, be condemned and defeated. See *Shilling, Adm'r, v. Accidental Death Insurance Co.* 2 H. & N. 42. It is not claimed that the parties to the assignment here in question had any design to circum-

vent or evade the law. Perhaps *Cammack v. Lewis*, 15 Wall. 643, *supra*, may be found to be a case of that kind. Again, the assignment is said to be a gambling transaction, a mere bet or wager upon the chances of human life. But the wager was made when the policy was effected, and has the sanction of the law. The assignment simply transfers the policy, as any other legal chose in action may be transferred, from the holder to a *bond fide* purchaser. It is true there is an element of chance and uncertainty in the transaction; but so there is when a man takes a transfer of an annuity, or buys a life estate, or an estate in remainder after a life estate. There is in all these cases a speculation upon the chances of human life. But the transaction has never been held to be void on that account. But finally it is urged that the purchaser or assignee subjects himself to the temptation to shorten the life insured, and that this the policy of the law does not countenance. The law permits the purchase of an estate in remainder after a life estate, which exposes the purchaser to a similar temptation. It has been decided, too, that a policy effected by a creditor on the life of his debtor does not expire when the debt is paid, though the holder then ceases to be interested in the continuance of the life, and is thereafter exposed to the same temptation, which is supposed to beset the assignee without interest, to bring it to an end. *Dalby v. India & London Life Assurance Co.* 15 C. B. 365; *Law v. London Indisputable Life Policy Co.* 1 Kay & J. 223; *Rawls v. Amer. Life Insurance Co.* 36 Barb. S. C. 357; also in 27 N. Y. 282, on appeal; *Campbell v. N. E. Mutual Life Insurance Co.* 98 Mass. 381; *Provident Life Insurance & Invest. Co. v. Baum*, 29 Ind. 236.

If the danger is not sufficient to avoid the policy when the interest ceases, why should it be sufficient to avoid the assignment to an assignee without interest? The truth is, it is one thing to say that a man may take insurance upon the life of another for no purpose except as a speculation or bet on his chance of life, and may repeat the act *ad libitum*, and quite another thing to say that he may purchase the policy, as a matter of business, after it has once been duly issued under the sanction of the law, and is therefore an existing chose in action or right of property, which its owner may have the best of reasons for wishing to dispose of. There is in such a purchase, in our opinion, no immorality and no imminent peril to human life. We should have strong reasons before we hold that a man shall not dispose of his own. Courts of justice, while they uphold the great and universally recognized interests of society, ought nevertheless to be cautious about making their own notions of public policy the criterion of legality, lest, under the semblance of declaring the law, they in fact usurp the function of legislation. *Hilton v. Eckersley*, 6 El. & B. 47, 64.

We therefore decide that whatever the law of this state may be in regard to procuring insurance upon the life of another without any interest in the life insured, it does not forbid the sale and assignment of a valid policy, which is already in existence, to an assignee without interest in the life insured, when the assignment is permitted or not prohibited by the policy, and is made, not as a contrivance to circumvent the law, but as an honest and *bond fide* business transaction.

Judgment for defendant for his costs.

SUPREME COURT OF MAINE.

(To appear in 66 Mo.)

INTEREST. — USURY. — LEX LOCI CONTRACTUS.

LINDSAY v. HILL.

The *lex loci contractus* determines the nature, validity, and construction of contracts; the *lex fori* determines the remedies for their enforcement.

In order to render a contract void for usury, it must be tainted with that offence in its inception.

The contracts and mortgage in this case, not being usurious in their origin, did not become "illegal and void" under the usury law of New Brunswick, where they were executed, by the receipt of usurious interest thereon.

The forfeiture provided by the laws of New Brunswick, being in the nature of a remedy, can only be enforced in that jurisdiction.

The statute, in force in this state when the usurious interest was paid, was repealed by the Act of 1870, which provides that "in the absence of any agreement in writing the legal rate of interest shall be six per cent." *Held*, that this act does not by necessary implication prohibit the taking of a higher rate of interest than six per cent. under a parol agreement. *Held*, also, that it operated a change in the law as it then stood, wherein it allowed a reduction from the principal, and recovery back, of usurious interest by action.

A foreign usury statute provided in substance that the reception of extra interest for the forbearance of payment of money, after it became due, would make the contract itself for the loan of the money void. *Held*, 1. That such provision, not entering into the contract at the time it was made, and being in the nature of a forfeiture, was to be interpreted by our courts according to the *lex fori* and not according to the *lex loci contractus*. 2. That in an action on the contract, the defendant should not be allowed, by way of recoupment, for the extra interest paid; although such extra interest was by the foreign statute recoverable by action.

WRIT OF ENTRY on mortgages of land lying in Calais, Maine. Writ, dated December 4, 1874.

Plea, general issue with brief statement that the amount secured by the mortgages has been paid, and nothing is due on the same.

And further, "that the contract, to secure which the mortgage of the land described in the plaintiff's writ was given, was made at St. Stephen, New Brunswick, and by its terms there to be performed; that upon said contracts more than six per cent. interest has been received by the plaintiff from the parties thereto, and their assignees, and that by the law of said province, at the time of said payments, the receiving of more than six per cent. interest made said contracts utterly void."

The plaintiff put into the case the mortgages given to her: one by one Bixby, dated May 12, 1846, to secure payment of \$2,000 in five years with interest; and one by Daniel Hill and Horatio N. Hill, copartners, dated June 1, 1848, to secure payment of a note of \$1,000 in one year with interest. Indorsements of payments of interest, not specifying any sum, were made upon each mortgage annually, or nearly so, to June 1, 1872, in the handwriting of Daniel Hill.

It was admitted that the land described in the writ is the land described in the first mortgage, and includes the land described in the second mort-

gage; and that the title of Bixby went to the Hills, copartners, with the agreement that they should pay off the Bixby mortgage; and that their title afterwards passed to the defendant.

Daniel Hill testified, and there was no evidence to the contrary, that from and after the times the sums secured by the mortgages became due, there was annually, substantially, paid to the plaintiff ten per cent. interest thereon, on a gold basis, to the time of the last payment, June 1, 1872; the extra interest, even without the gold premium, being more than sufficient, if deducted from the principal when paid, to pay off the entire sum secured by the mortgages.

The defendant put in chapter 102 of the Revised Statutes of New Brunswick, revision of 1854, which is admitted to have been the existing statute at the time the contract was made.

"I. No person shall, directly or indirectly, receive on any contract to be made for the loan of any money or goods, more than six pounds for the forbearance of one hundred pounds for one year, and after that rate for a greater or less sum, and longer or shorter time; and all deeds or contracts for the payment of any money to be lent, or for the performance of anything undertaken, upon or by which more than such rate of interest shall be reserved or received, shall be utterly void.

"II. Whoever shall upon any such deed or contract receive, by means of any fraudulent loan, bargain, exchange, or transfer of any money or goods, or by any deceitful means for the forbearing or giving day of payment beyond a year, of his money or goods, more than six pounds for one hundred pounds for one year, and after that rate for a greater or less sum, and longer or shorter time, shall forfeit for every offence the value of the principal sum or goods so loaned, bargained, exchanged, or transferred, together with all interest and other profits accruing therefrom; one moiety to be paid to the queen for the use of the province, and the other moiety to the person suing for the same, to be recovered by action in any court of record in the county where the offence may be committed, which action shall be brought within twelve months from the time of such offence."

It was "agreed that either party may cite from the New Brunswick Reports any decisions of the courts of that province applicable to the case, relating to the construction of the foregoing statute."

The full court are to render judgment according to the rights of the parties; and if for the demandant, she is to have the conditional judgment provided by statute.

E. B. Harvey, for the plaintiff. The payments made and indorsed as interest cannot be treated as payment of principal. No decided case justifies it. *Higly v. First National Bank of Beverly*, 24 Ohio, 76; 3 Parsons on Contracts, 115; *Houghton v. Page*, 2 N. H. 42.

The contracts, secured by the mortgages, were valid in their inception. To avoid a security as usurious you must show that the agreement was illegal from its origin. 3 Parsons, 115 and cases cited in note *q*, also at page 122; *Tate v. Wellings*, 3 Term R. 531, cited in *Bank of British N. A. v. Fisher*, 2 Allen N. B. Rep. 1.

The contracts were between residents of New Brunswick, and made there. Their construction and validity depend on the foreign law.

3 Parsons on Con. 114; *Houghton v. Page*, 2 N. H. 42; *Dunscorn v. Bunker*, 2 Met. 8.

The statute in evidence is strictly a penal statute; and the courts of this state will not enforce or notice the penal provisions of the laws of a foreign country. *Ogden v. Folliot*, 8 Term R. 726, 733; *Wolf v. Oxholm*, 6 M. & S. 99, and other cases cited in notes to Story on Conflict of Laws, 803; *Gale v. Eastman*, 7 Met. 14; 1 Hill. Mort. 373.

The taking the mortgages on property in Maine does not change the place of the contracts, as they are only accessorial to the originals which are none the less foreign. Story on Conflict of Laws, §§ 287 *a*, 293.

The alleged usurious payments were made after the debts were overdue and the contracts broken. There entered into them the considerations of the varying value of the currency, and the prices of goods received in part payment from a third party. Such payments are not usurious. *Bank of Orleans v. Curtis*, 11 Met. 359; *Fox v. Lipe*, 24 Wend. 164, cited in Hill. Mort. 18, § 17; 3 Parsons, 116, notes; *Cutler v. How*, 8 Mass. 257.

Defendant was not a party to the contracts secured by the mortgages. She did not make the payments charged to be usurious. Upon the Bixby mortgage the payments were not made by the original party contracting, nor by the defendant. She cannot recover here, to her own use, the penalty provided by the foreign statute to be recovered by a local action, in the foreign jurisdiction, within a time limited and long since elapsed, half to the queen.

It is not usury if a third person voluntarily pays a sum in excess of the legal interest. *McArthur v. Schenck*, 31 Wisc. 673.

F. A. Pike & A. McNichol, for the defendant. I. The excess of payment over six per cent. should be deducted from the principal. Such was the statute law of our state not repealed till 1870, after nearly all the payments were made by Hill. The repealing Act of 1870 provides "that in the absence of any agreement in writing, the legal rate of interest shall be six per cent." In the case at bar, there being no agreement in writing, the parties are thrown upon their rights at common law.

In *Peters v. Horton*, 2 Pugsley, 176, Ritchie, C. J., says: "Whatever doubts may once have been entertained as to the right of the party paying usurious interest to recover back any portion of the money so paid, they have long since been dissipated; and text books and cases now all agree that when a party has paid usurious interest he may recover back the excess beyond the legal rate in an action for money had and received. This is one of the exceptions to the general rule, that when money has been paid in pursuance of an illegal contract, it is generally irrecoverable; and the reason why it is so is because the law looks on both parties as being *in pari delicto*. But in the case of payment of usurious interest, it is considered that the law prohibiting the taking of more than a certain rate of interest is for the protection of men in needy and necessitous circumstances, and who from their situation and condition are liable to be oppressed and imposed upon; and so they and the parties taking advantage of their distress are not *in pari delicto*. The lender on usury being regarded by the law as the oppressor, and the borrower as the oppressed and injured."

This case was in 1874. The statute did not provide for the recovery back of money in the manner allowed in the case, and the chief justice put it on the common law doctrine. The case was similar to the one at bar. The debt had been paid by the payment of extra interest and \$165 in excess; and the court gave judgment for the \$165.

After enumerating the English authorities the chief justice says: "With these authorities, all the text books, English and American, agree."

The specific ground on which we place this portion of the defence is, that whenever Mr. Hill paid \$300, as he says he did, for the use of \$3,000 for one year, he paid \$180 for interest and \$120 on the principal; and the contract, not made in writing, by which the plaintiff claimed to put, and did put the whole \$300 to the account of interest, was illegal by the statute then existing and by the present statute.

We need make no account of the fact that the ten per cent. was paid with a gold premium; because the over payments in any event are sufficient to extinguish the principal.

II. The law of the place of contract and performance made the payment of more than six per cent. vitiate the contract.

The contracts secured by the mortgages declared on were made in New Brunswick and to be executed there. Mr. Hill and Mr. Bixby and Mrs. Lindsay were all residents of New Brunswick at the time of the execution of the contracts. The payments were all made in Mrs. Lindsay's house in New Brunswick, where she ever continued to reside.

The security, although bargained for in New Brunswick, was necessarily executed in the State of Maine; but, of course, if the sum stipulated for has been paid, or if the note and bond have been discharged, the mortgages are of no validity.

The statute given in the case is explicit, and the only question is whether this court is bound by it.

By the law of New Brunswick, where the contract was made and performed, the note and bond are in the language of the statute "utterly void." Can they be revived here?

DICKERSON, J. It is a rule of law, too well established to admit of controversy, that the nature, validity, and construction of contracts are to be determined by the law of the place where the contract is made, and that all remedies for enforcing such contracts are regulated by the law of the place where such remedies are pursued. In the one case, the *lex loci contractus*, and in the other, the *lex fori*, governs. Foreign statutes of limitation come within the latter clause of this rule; because they affect only the time within which a legal remedy must be pursued and not the gist of the contract itself. In the terse language of the court in *Andrews v. Pond*, 13 Pet. 65: "The legal consequences of an agreement must be decided by the law of the place where the contract was made; if void there, it is void everywhere." *Bulger v. Roche*, 11 Pick. 36, 37; *Duncomb et al. v. Barker*, 2 Met. 8, 10; *Gale v. Eastman*, 7 Met. 14, 16.

The contracts secured by the mortgages were made in New Brunswick and to be executed there. The parties to the contracts, at the time they were made, resided there; and the payments were all made in that province. The security, though bargained for in New Brunswick, was necessarily executed in this state.

The statutes of New Brunswick (R. S. § 1, c. 102), in force when the mortgages and contracts in controversy were executed, contained the following provision: "No person shall, directly or indirectly, receive on any contract to be made for the loan of any money or goods, more than six pounds for the forbearance of one hundred pounds for one year, and after that date for a greater or less sum, and longer or shorter time; and all deeds or contracts for the payment of any money to be lent, or for the performance of anything undertaken, upon or by which more than such rate of interest shall be reserved or received, shall be utterly void."

Section second of the same statute imposes a forfeiture of the principal sum lent and all the interest, upon the lender for every offence against its provisions.

In order to render a contract void for usury, it must be tainted with that offence in its inception. It is the reservation or receipt of usurious interest, in pursuance of the terms of the contract itself, that renders it void; the subsequent payment of such interest upon a contract free from the taint of usury in its origin will not have this effect. 3 Parsons on Contracts, 115; *Nichols v. Pearson*, 7 Pet. 103; *Rice v. Welling*, 5 Wend. 595, 597; *Gardner v. Flagg*, 8 Mass. 101.

But the law is otherwise in respect to incurring the penalty or forfeiture for a violation of the law against usury. In that case, the subsequent receipt of usurious interest by the lender, upon a contract originally untainted with usury, renders him liable to the penalty or forfeiture incurred. In *Floyer v. Edwards*, Camp. 112, Lord Mansfield said: "In case the agreement originally for the payment of principal be legal, and the interest does not exceed the legal rate; but afterwards upon payment being forborne illegal interest is demanded, there the agreement by retrospect is not void, but the parties are liable to the penalty of treble value." 3 Parsons on Contracts, 123; *Thompson v. Woodbridge*, 8 Mass. 256.

The instruments in controversy appear to have been given in the usual course of business, and upon their face are free from the taint of usury. The alleged usurious payments were made after the debts were over due and the contracts were broken. The contracts, therefore, were not void under § 1, chap. 102, R. S. of New Brunswick, but the forfeiture imposed by § 2, of the same chapter was incurred by the defendants. That forfeiture is in the nature of a remedy, which, as we have seen, can extend only to suits brought in New Brunswick, and can have no effect where a remedy is sought under our laws; in other words, the defendant, in this respect, cannot invoke the same defence in this state that he could make in New Brunswick. *Gale v. Eastman*, *supra*; *Duncomb et al. v. Bunker*, *supra*.

The case is therefore to be determined by the law of the forum selected by the plaintiff for the enforcement of her rights. Can the defendant here avail herself by way of recoupment, set-off, or otherwise, of the excess paid over six per cent. upon the contracts in controversy?

When the alleged usurious payments were made, our statute provided that in an action brought to recover the principal and interest, in such a case, the usurious interest might be deducted from the principal. But that statute was repealed in 1870, and, instead of it, the present statute

was enacted, which simply provides that "in the absence of any agreement in writing, the legal rate of interest shall be six per cent. per annum."

It is argued by the learned counsel for the defendant, that an action for money had and received lies to recover back the amount of usurious interest paid, and that, to avoid circuity of action, that sum may be allowed the defendant, in extinguishment of her original indebtedness, as it exceeds that amount. The authorities indicate that where a usurious contract is declared illegal and void by statute, the money paid thereon is to be regarded as taken illegally, and as oppressively extorted from the borrower, and that, therefore, the equitable action for money had and received lies to recover it back. It is upon this ground that the authorities relied upon to support the defendant's theory rest. This question is discussed by Shaw, C. J., in *Crosby v. Bennett*, 7 Met. 17, 18; and the distinction is expressly made between usurious contracts that are made illegal and void by statute, and those that are not, giving the equitable action for money had and received to recover back the usurious interest paid in the former case, and denying it in the latter. We think this distinction is well taken. Where the law does not prohibit usury, nor make usurious contracts illegal or void, it cannot regard the taking of a greater sum for the use of money than is fixed by law as illegal or oppressive, which is the gist of the right of recovery invoked by the defendant. It is only upon the ground that the payments made by her grantors were received in violation of law, that she claims the right to recoup; if no law has been violated, there is no right of recoupment.

While our statute fixes the legal rate of interest at six per cent. per annum, it does not in terms nor by necessary implication prohibit the taking of a greater sum, nor declare contracts for a greater rate illegal or void. Nor does it provide for the deduction of the amount of interest paid in excess of this rate from the principal upon action brought therefor, or for its recovery back where there is "no agreement in writing" in respect to interest. It simply declares what shall be the legal rate of interest when there is no agreement in writing for a different rate.

This construction of the statute harmonizes with the action of the legislature upon this subject. Contemporaneously with the enactment of the present statute, the legislature passed an act repealing the Usury Act of 1857, which contained the identical provisions for the deduction from the principal, and the recovery back, of usurious interest, where paid, that are now sought to be applied in this case. That act of repeal was a legislative construction of the existing statute. By its repeal of the Act of 1857, and its omission to incorporate the provisions contended for by the defendants into the new statute, the legislature clearly intended to effect a radical change in the law of usury. It would be an alarming exercise of judicial power of construction to hold that the law is the same upon the subject under consideration as it was before the statute of 1857 was repealed. Such a construction would render the repealing act nugatory. Language could scarcely make the intention of the legislature to abolish the remedies provided in the statute of 1857 more intelligible. This court cannot undertake to revive by construction a doctrine which the

legislature obviously intended to discard by positive enactment. Our conclusion is, that the defendants are not entitled to have the amount of usurious interest, paid by them, deducted from the contracts secured by the mortgages in suit.

Conditional judgment for plaintiff as on mortgage.

SUPREME COURT OF THE UNITED STATES.

[OCTOBER TERM, 1876.]

FORMER JUDGMENT. — WHEN AN ESTOPPEL.

RUSSELL v. PLACE.

A judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties; but to this operation of the judgment it must appear, either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, the whole subject matter of the action will be at large and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible.

In an action at law for damages for the infringement of a patent for an alleged new and useful improvement in the preparation of leather, which patent contained two claims: one for the use of fat liquor generally in the treatment of leather; and the other for a process of treating bark-tanned lamb or sheepskin, by means of a compound composed and applied in a particular manner; the declaration alleged, as the infringement complained of, that the defendants had made and used the invention, and caused others to make and use it, without averring whether such infringement consisted in the simple use of fat liquor in the treatment of leather or in the use of the process specified: *Held*, that the judgment recovered in the action does not estop the defendant in a suit in equity by the same plaintiff, for an injunction and an accounting for gains and profits, from contesting the validity of the patent, it not appearing by the record, and not being shown by extrinsic evidence, upon which claim the recovery was had; the validity of the patent was not necessarily involved, except with respect to the claim which was the basis of the recovery: a patent may be valid as to a single claim and invalid as to the others.

If upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence.

MR. JUSTICE FIELD delivered the opinion of the court.

This is a suit for an infringement of a patent to the complainant for an alleged new and useful improvement in the preparation of leather, and is similar in its general features to the suit of the complainant against Dodge, recently decided. It is submitted upon substantially the same testimony, and presents, with one exception, the same questions for determination. That exception relates to the operation, as an estoppel against setting up the defences here made, of a judgment recovered by

the complainant against the defendants in an action at law for the infringement of the patent.

The bill of complaint sets forth the invention claimed, the issue of a patent for the same, its surrender for alleged defective and insufficient description of the invention, its reissue with an amended specification, and the recovery of judgment against the defendants for damages in an action at law for a violation of the exclusive privileges secured by the patent.

The bill then alleges the subsequent manufacture, use, and sale by the defendants without the license of the patentee of the alleged invention and improvement, and prays that they may be decreed to account for the gains and profits thus acquired by them, and be enjoined from further infringement.

The answer admits the issue of the patent, its surrender and reissue, and as a defence to this suit sets up in substance the want of novelty in the invention, its use by the public for more than two years prior to the application for the patent, and that the reissue, so far as it differs from the original patent, is not for the same invention. The answer also admits the recovery by the complainant in the action at law of the judgment mentioned, but denies that the same issues were involved, or tried, in that action which are raised in this suit.

The action at law was brought in the circuit court of the United States for the Northern District of New York, in the ordinary form of such actions for infringement of the privileges secured by a patent. The defendants pleaded the general issue, and set up, by special notice under the act of Congress, the want of novelty in the invention, and its use by the public for more than two years prior to the application for a patent. The plaintiff obtained a verdict for damages, upon which the judgment mentioned was entered; and this judgment, it is now insisted, estops the defendants in this suit from insisting upon the want of novelty in the invention patented, and its prior use by the public, and also from insisting upon any ground going to the validity of the patent which might have been availed of as a defence in that action; and, of course, upon the want of identity in the invention covered by the reissue with that of the original patent.

It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, — as for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered, — the whole subject matter of the action will be at large and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible.

Thus in the case of the *Washington, Alexandria & Georgetown Steam-Packet Company v. Sickles*, reported in the 24th of Howard, a verdict and judgment for the plaintiff in a prior action against the same defendant on a declaration, containing a special count upon a contract and the common counts, was held by this court not to be conclusive of the existence and validity of the contract set forth in the special count, because the verdict might have been rendered without reference to that count, and only upon the common counts. Extrinsic evidence showing the fact to have been otherwise was necessary to render the judgment an estoppel upon those points.

When the same case was before this court the second time (*Packet Co. v. Sickles*, 5 Wall. 592), the general rule with respect to the conclusiveness of a verdict and judgment in a former suit between the same parties, when the judgment is used in pleading as an estoppel, or is relied upon as evidence, was stated to be substantially this: that to render the judgment conclusive it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined; that is, that the verdict in the suit could not have been rendered without deciding that matter; or it must be shown by extrinsic evidence, consistent with the record, that the verdict and judgment necessarily involved the consideration and determination of the matter.

Tested by these views, the question presented by the plaintiff in this case, upon the effect as evidence of the verdict and judgment in the action at law, is of easy solution. The record of that action does not disclose the nature of the infringement for which damages were recovered. The declaration only avers that the plaintiff was the original and first inventor of a new and useful improvement in the preparation of leather, and that he obtained a patent for the same, and on its surrender a new patent with an amended specification, without describing with other particularity the nature and operation of the invention, and alleges as the infringement complained of that the defendants have made and used the invention, and have caused others to make and use it. The patent contains two claims: one for the use of fat liquor generally in the treatment of leather; and the other for a process of treating bark-tanned lamb or sheep-skin by means of a compound composed and applied in a particular manner. Whether the infringement for which the verdict and judgment passed consisted in the simple use of fat liquor in the treatment of leather, or in the use of the process specified, does not appear from the record. A recovery for an infringement of one claim of the patent is not of itself conclusive of an infringement of the other claim, and there was no extrinsic evidence offered to remove the uncertainty upon the record; it is left to conjecture what was in fact litigated and determined. The verdict may have been for an infringement of the first claim; it may have been for an infringement of the second; it may have been for an infringement of both. The validity of the patent was not necessarily involved, except with respect to the claim which was the basis of the recovery. A patent may be valid as to a single claim and not valid as to the others. The record wants, therefore, that certainty which is essential to its operation as an estoppel, and does not conclude the defendants from contesting the infringement or the validity of the patent in this suit.

The record is not unlike a record in an action for money had and received to the plaintiff's use. It would be impossible to affirm from such a record with certainty for what moneys thus received the action was brought, without extrinsic evidence showing the fact; and of course, without such evidence, the verdict and judgment would conclude nothing, except as to the amount of indebtedness established.

According to Coke, an estoppel must "be certain to every intent;" and if upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence. See *Aiken v. Peck*, 22 Vt. 260, and *Hooker v. Hubbard*, 102 Mass. 245.

The decree is affirmed.

Mr. Justice CLIFFORD dissented.

SUPREME COURT COMMISSION OF OHIO.

(To appear in 29 Ohio St.)

EXPRESS COMPANY A COMMON CARRIER. — LIABILITY OF CARRIER. — EXEMPTION IN BILL OF LADING. — NEGLIGENCE. — BURDEN OF PROOF.

UNITED STATES EXPRESS COMPANY v. BACKMAN.

1. A common carrier is one that undertakes for hire or reward to carry, or cause to be carried, goods for all persons indifferently who may choose to employ him, from one place to another.
2. An express company, that receives and agrees to transport goods from one designated place to another designated place, for a compensation, in the ordinary means of conveyance, is a common carrier, although not the owner, and having no interest in the conveyance by which the goods are transported.
3. A common carrier is liable for the value of the goods lost through its negligence, notwithstanding the bill of lading provides that the carrier shall not be liable beyond an amount named therein, when it is understood by the parties that the sum so agreed on is less than the value of the goods. Such an agreement can at most cover a loss arising from some cause other than the negligence or default of the carrier or his servants, and the rule of damages is the same, although less is charged and paid for the transportation than when the exempting clause is omitted.
4. In an action on the ground of negligence against a common carrier upon a bill of lading containing an exemption from liability from loss by fire, the burden of proof is on the carrier to show that the loss occurred within the terms of the exemption, and that the loss occurred without fault on his part.

ERROR to the superior court of Cincinnati in general term.

Plaintiff below (defendant in error), on the 8th day of June, 1869, caused to be delivered to plaintiff in error (defendant below), as a common carrier, the owner and proprietor of a certain line called the "Great Western Dispatch," one hundred and twenty-five barrels of whiskey, thirty-five half barrels of whiskey, and two empty barrels, all of the alleged value of fifty thousand dollars, to be carried from the city of Cincinnati, in the State of Ohio, to the city of New York, in the State of New York, for a reasonable reward. Plaintiff in error received the goods, and delivered to defendant in error a bill of lading, of which the following is a copy: —

Great Western Dispatch,

UNITED STATES EXPRESS COMPANY, — PROPRIETORS.

W. H. PERRY, Gen'l Supt.

VIA

C. H. HINMAN, Ass't Supt.

Cincinnati, Hamilton & Dayton, Atlantic & Great Western, and Erie Railways.

Exhibit.

JOHN M'CUNE,
Freight Agent,
No. 80 West Fourth St.

Cincinnati, O., June 8th, 1869.

RECEIVED, from J. S. Cleary & Co.,
the following Packages, contents unknown
(in apparent good order), viz.:

WEIGHT,
Subject to Correction.

MARKS.



ORIGINAL.

For
CHAS. BACKMAN,
88 Front Street,
New York, N. Y.

This Bill of Lading

IS FROM

CINCINNATI

To New York.

THE RATE OF FREIGHT
THROUGH

IS TO BE

50c. per 100 lbs.
.....per Barrel.
.....per Bale.

TIME THROUGH IS
GUARANTEED

Not to exceed.....days.

Day of Shipment, Day of
Arrivals, and Sundays ex-
cepted.

Under a penalty of 5 cents
per 100 lbs. per day for each
day of overtime.

It is part of this Contract
that the specified penalty for
overtime shall be taken as
the maximum claim for de-
lays, when time is GUARAN-
TEED. When no time is guar-
anteed, and the blank above
for number of days is left
void, there shall be no claim
whatever against the Carriers
for delay.

116	Brls. Whiskey.....	41,700
85	Hlf. ".....	7,000
9	bbls.	8,000
2	empty bbls.	

Subject to \$20 clause.

51,800

Pier 48.

ALL RAIL.

Marked and numbered as per margin, to be transported by the Great Western Dispatch to terminus or reshipping point of their roads, and there delivered to the Agents of Connecting Steamboats, Railroad Companies, or Forwarding Lines, on the following terms and conditions, viz.: That the Shipper, Owner, and Consignee, do hereby release the Great Western Dispatch, and the Boats and Railroads with which they connect, from loss or damage arising from the acts of Providence; also damage or delays by unavoidable accidents.

That the said Great Western Dispatch, and the Steamboats, Railroad Companies, and Forwarding Lines with which they connect, and which receive said property, shall not be liable for leakage of Oil, or any kind of Liquids, breakage of any kind of Glass, Earthen, or Queensware, Carboys of Acid, or articles packed in Glass, Stoves, or Stove Furniture, Castings, Machinery, Carriages, Furniture, Musical Instruments of any kind, packages of Eggs, or for rust of Iron, and of Iron articles, or for loss or damage by wet, dirt, fire, or loss of weight, or for condition of baling on Hay, Hemp, or Cotton; nor for the loss or damage of any kind on any article whose bulk requires it to be carried on open cars; nor for damage to perishable property of any kind, occasioned by delays from any cause, or by changes of weather; nor for loss or damage on any article or property whatever, by fire or other casualty while in transit, or while in deposit of transshipment, or at depots or landings at points of delivery; nor for loss or damage by fire, collision, or the dangers of Navigation while on Sea, Rivers, Lakes, or Canals. All goods or property under this Bill of Lading will be subject, at the owner's cost, to necessary coopersage or baling, and is to be transported to the depots of the Companies or landing of the Steamboats or Forwarding Lines at the points received to, for delivery.

AND IT IS FURTHER AGREED, that the Great Western Dispatch, and the Steamboats, Railroads, and Forwarding Lines with which it connects, shall not be held accountable for any damage or deficiency in packages after the same shall have been received for in good order by consignees or their Agents, at or by the next Carrier beyond the point to which this Bill of Lading contracts. Consignees are to pay freight and charges upon said goods or merchandise in lots or parts of lots as they may be delivered to them.

IT IS FURTHER STIPULATED AND AGREED, that in case of any loss, detriment, or damage done to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, the Great Western Dispatch shall have the full benefit of any insurance that may have been effected upon or on account of said goods.

AND IT IS FURTHER AGREED, that the amount of the loss or damage so accruing, so far as it shall fall upon the carriers above described, shall be computed at the value or cost of the said goods or property at the place and time of shipment under this Bill of Lading.

THIS CONTRACT is executed and accomplished, and the liabilities of the Companies as Common Carriers thereunder terminate, on the arrival of the goods or property at the station, or depot of delivery (and the Companies will be liable as warehousemen only thereafter), and unless removed by the Consignee from the Station or depots of delivery within 24 hours of their said arrival, they may be removed and stored by the Companies at the owner's expense and risk.

NOTICE. — In accepting this Bill of Lading, the Shipper or the Agent of the owner of the property carried, expressly accepts and agrees to all its stipulations, exceptions, and conditions.

IN WITNESS WHEREOF, the Agent hath affirmed to 2 Bills of Lading of this tenor and date, one of which being accomplished, the other to stand void.

It is admitted the goods were not delivered to defendant in error entire in the city of New York, but that fifty barrels of the whiskey were destroyed by fire while in transit and wholly lost, and that the whiskey so destroyed was of the value of \$7,214.63.

Defendant denied that it was a common carrier, or that it held itself out as such; but, on the contrary, it only professed to carry certain kinds of goods along specified lines of railway, in cars provided by the general railway companies, and run by and under the control of the agents and officers of such companies, and that they received no goods to be carried as aforesaid, except upon an express agreement containing the terms stated in their advertisements, and the forms of agreement used by them. That it is true that the plaintiff, by his agents J. S. Cleuray & Co., did deliver to them at Cincinnati, on the 8th day of June, 1869, the whiskey and barrels mentioned in the petition, but the same were not delivered to them as common carriers, nor accepted by them as such, but upon an agreement, a copy of which is attached to the petition.

And the defendant further says that the expression in said agreement, "Subject to a \$20.00 clause," means, and was so understood by the parties thereto, that in case of a non-delivery of any part of said goods, for which the defendants would be liable, the valuation thereof should not exceed twenty dollars for each barrel not delivered.

Plaintiff below in reply says:—

"It is not true that the expression in said agreement, 'Subject to a \$20.00 clause,' means, or that this plaintiff or his said agents who delivered said whiskey, so understood it to mean, that in case of non-delivery of any part of said goods for which the defendant would be liable, the valuation thereof should not exceed \$20.00 for each barrel not delivered; . . . plaintiff also avers that it is expressly agreed and stipulated in said bill of lading that in case of any loss, detriment, or damage done to, or sustained by, said goods, the amount of such loss or damage so accruing, so far as it should fall upon the said carriers, should be computed at the value or cost of the said goods or property, at the place and time of shipment under said bill of lading; and that the agreement aforesaid is the only agreement ever made by this plaintiff with the defendant as to the mode of computing the loss or damage, if any should accrue to said goods.

"It is not true that the said fifty barrels of whiskey were destroyed by fire without the neglect or default of the defendant, or its agents, or servants, nor was the defendant excused from delivering the same to plaintiff."

On trial in special term of the superior court, the jury returned a verdict for the plaintiff below. On the refusal of that court to grant a new trial, the case was taken by petition in error to said superior court in general term. On being affirmed in that court, a petition in error was allowed to be filed in the supreme court. On the trial a bill of exceptions was taken, embodying all the testimony, agreed facts, and charge of the court.

Mathews, Ramsey & Mathews, for plaintiff in error. 1. The court below assumed, in its charge to the jury, that the defendant below was a common carrier. This was error.

It cannot be claimed that the defendant, by the law of its creation,

irrespective of the facts, was constituted a common carrier, as in the case of railroad companies by their charters, for that does not appear.

The question of the alleged error then turns upon this — whether the defendant, in its answer, notwithstanding its formal denial of the fact, admitted substantially facts which, in law, made it a common carrier, or, which is the same thing, whether the facts, which the testimony on that point tended to prove, established its character as such.

The very and only ground of charging the defendant as a common carrier is the fact that it has exercised an employment of that nature. But the actual fact, alleged and proven, is, that the employment it undertook and assumed to exercise was not of that nature, but of a nature entirely distinct.

To hold otherwise is to abolish the distinction between private and common carriers, by making the business of the former a legal impossibility. *York Co. v. Central R. R. Co.* 3 Wallace, 112; *The New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 382; *Graham & Co. v. Davis & Co.* 4 Ohio St. 367.

This statement of the law is inconsistent with *Davidson v. Graham*, 2 Ohio St. 181; and *Graham & Co. v. Davis & Co.* 4 Ohio St. 362, so far as it seems to permit one acknowledged to be a common carrier to convert himself by contract into a private character; but that inconsistency does not exist when the character of a common carrier has never existed. *Welsh v. P., Ft. W. & C. R. R. Co.* 10 Ohio St. 75.

2. The charge of the court as to the burden of proof was erroneous. *Railroad Co. v. Reeves*, 10 Wall. 189; *Transportation Co. v. Downer*, 11 Wall. 134; *Lamb v. C. & A. R. R. Co.* 46 N. Y. 278.

3. The instruction that the clause in the agreement, limiting the liability in case of loss to a valuation of \$20 per barrel, was void; and that, if the plaintiff was entitled to recover at all, his damage should be computed upon the basis of the full actual value of the goods not delivered, was erroneous. *Judson v. Western R. R. Co.* 6 Allen, 486; *Gaston v. Bristol & Exeter R. R. Co.* 1 B. & S. 162; *Peck v. N. S. R. R. Co.* 9 Jurist, 914; 116 Eng. Com. Law, 1018; *Carr v. L. & Y. R. R. Co.* 7 Excheq. 707; *Wise v. G. W. R. R. Co.*, cited in *Simons v. G. W. R. R. Co.* 18 Com. Bench, 196; E. C. L. 823; *Hinton v. Dibelin*, 2 Q. B. 646.

Cox, Burnett & Follett, and *Von Seggern & Glidden*, for defendant in error. 1. The plaintiff in error is a common carrier, and received the goods described in the bill of lading as such. Story on Bailments, § 494 *et seq.*, and cases cited in notes; *Dwight v. Brewster*, 1 Pick. 50; *Wilson v. Hamilton*, 4 Ohio St. 722; *Reed v. Spaulding*, 5 Bosw. (N. Y.) 895; 2 Kent. 598; 2 Redf. on Railways, § 1 *et seq.*, and cases cited in notes; 1 Redf. on Car. § 47, and cases there cited; 2 Redf. on Railways, § 170, and cases there cited; *Gulliver v. Adams Express Co.* 38 Ill. 503; 2 Redf. on Railways, 30.

2. Bearing in mind the provisions of the bill of lading and the facts of the case, the charge of the court on the subject of the \$20 limiting clause was correct. *Welsh v. Pittsburg, &c. R. R. Co.* 10 Ohio St. 65; *Davidson v. Graham*, 2 Ohio St. 181; *Graham & Co. v. Davis & Co.* 4 Ohio St. 362; *C. H. & D. and D. M. R. R. Co. v. Pontius & Richmond*, 19 Ohio St. 221; *Jones v. Voorhees*, 10 Ohio, 145; *Beck v. Evans*, 16 E. T.

244; *Kember v. Express Co.* 22 La. Ann. 158; *Express Co. v. Crook*, 44 Ala. 468.

3. The charge of the court as to the burden of proof was also correct. *Graham & Co. v. Davis & Co.* 4 Ohio St. 362; 2 Greenl. Ev. § 219; *P. & R. R. Co. v. Derby*, 14 How. 468; *Welsh v. R. R. Co.* 10 Ohio St. 69; *Davidson v. Graham*, 2 Ohio St. 131; Angell on Car. §§ 202, 239 *et seq.*, and cases cited in notes; Story on Bailm. § 529, and cases cited in notes; 2 Greenl. on Ev. § 219.

ASHBURN, J. It is assigned for error in this court: 1. That the court aforesaid, on the trial of said cause at special term, erred in its charge to the jury; . . . 4. That said court, at general term, erred in affirming the judgment aforesaid.

In the view we have taken of the questions involved, the case will be disposed of in considering the exceptions taken by plaintiff in error to the charge of the court to the jury.

1. It is said the court below erred in assuming in its charge to the jury that the defendant below was a common carrier.

The court below, in its charge to the jury, did so assume, and among other things said to the jury: "Without stating all the arguments for this conclusion, I may state that this company cannot stipulate against its own negligence. Such a stipulation would be contrary to public policy. But in all other respects a common carrier may limit his liability in case of loss by special contract.

If the defendant was a common carrier, the above instruction is law. It has been settled by a line of well-considered cases in this state, that common carriers cannot, by any agreement with their employers, exempt themselves from liability for loss occasioned by their own negligence, or the negligence of their servants. *Davidson v. Graham*, 2 Ohio St. 132; *Graham & Co. v. Davis & Co.* 4 Ohio St. 362; *Welsh & Welsh v. P., Fort W. & C. R. R. Co.* 10 Ohio St. 65; *C. P. & A. R. R. Co. v. Curran*, 19 Ohio St. 1; *The Union Express Company v. A. A. Graham*, 26 Ohio St. 595.

In *Railroad Company v. Lockwood*, 17 Wall. 357, the Ohio doctrine is fully recognized, the court holding: "1. A common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law. 2. It is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for negligence of himself or his servants."

Was the defendant below a common carrier?

"A common carrier has been defined to be one who undertakes for hire or reward to transport the goods of such as choose to employ him from place to place." Story on Bailments, 443.

"To constitute one a common carrier he must make that a regular and constant business, or, at all events, he must for a time hold himself ready to carry for all persons indifferently who choose to employ him." 2 Redfield on the Law of Railways, 3, 4.

A common carrier, then, is one that undertakes for hire or reward to carry, or cause to be carried, goods for all persons indifferently who may choose to employ him or it from one place to another.

Transportation by express companies has come into practice very much

since the general use of railways for transportation purposes. It seems more necessary on account of the rapid movement upon such roads, and also the mode in which business is generally transacted by railway companies of only delivering at their stations. The express company uses its wagons in large cities to collect and deliver goods to the owners and consignees. They also have their agents at various stations along the line of transportation to receive and deliver goods.

In treating of the rights and duties of express carriers, Mr. Redfield on Railways, p. 33, says: "And there can be no question that, upon general principles, these expresses are liable as common carriers, and liable, according to the course of their business, and the expectation thereby created in the minds of their employers, for all parcels received into their wagons, and bound to make personal delivery to the consignees or their agents, at their places of business, or, in default of having such, at their residences."

Numerous authorities hold this to be the rule. *Haslam v. Adams Express Co.* 6 Bosw. 235; 23 Ill. 197; 5 Bosw. 395; *Place, Jr. v. Union Express Co.* 2 Hilton, 19; *Gulliver v. Adams Express Co.* 38 Ill. 503; *Richards v. Westcott*, 2 Bosw. 589; *Hooper v. Wells, Fargo & Co.* 27 Cal. 1; *Southern Express Co. v. Newby*, 36 Geo. 635; *Buckland et al. v. Adams Express Co.* 97 Mass. 124.

In this last case it was held, and we think correctly, "One whose business is for hire to take goods from the custody of their owner, assume entire possession and control of them, transport them from place to place, and to deliver them at a point of destination to consignees or agents there authorized to receive them, is a common carrier, although he styles himself an express forwarder, and although he contracts with others to transport the goods in vehicles of which they are the owners, and the movements of which he himself does not manage or control."

The bill of lading shows, we think, that the defendant below was a common carrier. It was in the market soliciting public patronage, offering to cause goods to be transported from place to place for reward for all persons indifferently, and did agree with the plaintiff below, as the proprietor of the Great Western Dispatch, for reward, to carry the whiskey named in the bill of lading from Cincinnati to New York by way of the Cincinnati, Hamilton and Dayton, Atlantic and Great Western, and Erie Railways. It shows the goods to be carried were received by the express company at Cincinnati, and to be delivered at New York. It was stipulated, "This contract is executed and accomplished, and the liabilities of the companies as common carriers thereunder terminate, on the arrival of the goods or property at the station or depot of delivery." The sense of this is, that the liability of the United States Express Company; that the liability of the Cincinnati, Hamilton, and Dayton Railway Company, and each of the other railway companies over which the goods were to be carried as common carriers, would continue, and not be discharged until the goods were delivered at the depot of the Erie Railway in New York—the rule being that express companies cannot relieve themselves from responsibility otherwise than by delivering the property at the place designated in the bill of lading.

The following provision in the bill of lading is equally significant in showing the express company to be a common carrier:—

"And it is further agreed, that the Great Western Dispatch, and the steamboats, railroads, and forwarding lines with which it connects, shall not be held accountable for any damage or deficiency in packages after the same shall have been receipted for in good order by consignees, or their agents, at or by the next carrier beyond the point to which this bill of lading contracts. Consignees are to pay freight and charges upon said goods or merchandise in lots or parts of lots as they may be delivered to them."

The legal force of this provision is to render the United States Express Company, as the owner of the Great Western Dispatch, responsible, as a common carrier, for any damage or deficiency in packages delivered to its care until receipted for by the consignees or their agents, or by the next carrier who shall receive them to carry beyond the point to which the bill of lading contracts—in this case, at the city of New York.

A still further evidence that the defendant below was a common carrier appears in this:—

"It is further stipulated and agreed, that in case of any loss, detriment, or damage done to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, the Great Western Dispatch shall have the full benefit of any insurance that may have been effected upon or on account of said goods."

We think the express company stipulated that they should have the benefit of any insurance on the whiskey in case of its loss, detriment, or damage during transportation, for the sole reason that it regarded its undertaking, in that behalf, to be that of a common carrier.

It is claimed that plaintiff in error should not be held to strict liability as a common carrier, for the reason that the contract for carriage is essentially modified by the mode in which it undertook the performance of the service. The ground upon which this defence rests is, that express carriers over railroads to which they have no official relation cannot, from the very nature of the case, exercise any care or control over the means of transportation which they, from the necessity of the case, adopt; that carriages in which the goods intrusted to them are placed, and the agents and servants by whom they are managed, are not selected by them, nor subject to their direction or supervision.

We think this defence, and the reasoning to support it, unsound. The essence of the contract is that the contractors will cause the goods intrusted to their care to be safely carried to the place of their destination, unless this is prevented by the act of God or the public enemy. This is the contract, whether the property is to be transported by the express company itself or agencies employed by it. The contract does not imply a personal trust, but contemplates only that the property shall be safely and in good order carried to the designated destination.

We hold, then, that this express company was a common carrier, and the court did not err in so assuming and charging.

The next error assigned is in that part of the charge to the jury, in which they were instructed that the clause in the agreement limiting the liability in case of loss to a valuation of "\$20" per barrel, was void, and that if the plaintiff was entitled to recover at all, his damages should be

computed upon the basis of the full actual value of the goods not delivered.

The court charged the jury on this point, as follows: "It has already been stated to you that the alleged restriction of liability of the defendant in case of a loss of the property shipped, contained in the bill of lading by the insertion of the words, '*subject to the \$20 clause*,' is void. Without stating all the arguments for this conclusion, I may state that this company cannot stipulate against its own negligence. Such a stipulation would be contrary to public policy. But in all other respects a common carrier may limit his liability in case of loss by special contract. If the defendant lost this whiskey by its own negligence, it cannot restrict its liability to \$20 a barrel, if, as may be admitted, it was advised of the nature and value of the article to be transported, and if this whiskey was, in fact, worth more than \$20 a barrel at the time."

We find in the bill of exceptions, "it was admitted by the defendant that the whiskey in question, at the time and place of shipment, was of much greater value than \$20 per barrel, and that the defendant knew that fact at the time."

The defendant also offered evidence to show that, according to the general custom of the trade and business prevailing in Cincinnati, known to dealers in and shippers of whiskey, and to those engaged in the transportation thereof from the West to the East, that whiskey was classified both as second class and fourth class freight, — the classification as fourth class, based on the consideration that when carried as such, it was agreed to be of the value of not to exceed \$20 per barrel, in consideration of which the rate charged as freight for its transportation was about the average one third of the rate charged for its transportation as second class freight; that it was at the option of shippers to select either classification, paying the rate accordingly, but that the general practice of shippers was to select the classification as fourth class, on account of the lower rate, and that the advertisement on the bill of lading of the words, written on the face thereof, "*subject to the \$20 clause*," meant that the shipment was as fourth class freight, and that in the event of loss, for which the carrier was liable, the amount of damage recoverable should be limited to the valuation of \$20 per barrel.

The defendant also offered evidence that the freight charged for the shipment in the case was the customary rate at the time for fourth class freight.

This is not a new question. An exemption of this character was made and decided against a common carrier in 1812, in the case of *Beck et al. v. Evans et al.* 16 East, 248. The carrier gave notice he would not be answerable for cash, &c., or any other goods of what nature or kind soever above the value of £5, unless upon special agreement and adequate compensation, "unless a special agreement is made and an adequate premium paid." The goods he received and lost was a cask of brandy worth £70. It was held that from the bulk and nature of the goods the carrier was charged with knowledge, and must have known the goods to be of greater value than £5, and when lost by reason of his negligence he was responsible for the full value of the goods lost.

The Ohio cases hereinbefore cited make it clear that common carriers

cannot, by contract, exempt themselves from liability for full damages for a loss occasioned by their own negligence or that of their servants. No more can they legally stipulate for a partial exemption from liability caused by like negligence. The public policy that avoids a contract for total exemption will hold a contract void that provides for partial exemption in such case. The fact that by reason of such contract the carrier undertook the transportation of the goods for a diminished reward will avail him nothing.

We do not think the parties contemplated a double rule for determining a compensation for loss or damage. And yet if the twenty-dollar clause is to be the rule of compensation in case of loss, it is in direct conflict with the following rule for compensation set out in the bill of lading: And it is further agreed, that the amount of the loss or damage so accruing, so far as it shall fall upon the carriers above described, shall be computed at the value or cost of the said goods or property at the place and time of shipment under this bill of lading.

"To permit carriers to fix a limitation to the amount of their liabilities for negligence is, in effect, to permit them to exempt themselves from such liability." *Steamboat City of Norwich*, 4 Benedict, 271.

Carriers may by contract limit their liability, at common law, for damages or loss arising from other cause than negligence of themselves or their servants. They cannot, however, as liquidated damages, where it is understood by the parties the sum agreed on is less than the value of the goods, determine in advance the quantum of damages for loss occasioned by negligence.

Courts could, probably, in a proper case, give effect to and apply for the benefit of the carrier the phrase in the bill of lading, "subject to the \$20 clause," but not in a case like this, grounded wholly on the carrier's negligence.

As applied in this case to the question of damages arising from negligence on the part of the common carrier, it could not be misleading to say to the jury a phrase on the bill of lading was void, which could, in no aspect of the case presented for their consideration, avail the carrier anything whatever.

It is claimed the court erred in the charge to the jury as to the burden of proof and degree of care the express company was bound to exercise.

The court on this question said to the jury: "The burden of proof to establish the fact of the exercise of due care is upon the defendants. The mere non-delivery of the whiskey to the consignee is presumptive evidence of loss by negligence. The law exacts of a carrier a high degree of care; yet if you shall be satisfied from the preponderance of the evidence that the defendant exercised all reasonable care, and that the loss was occasioned by causes over which it had no control, and not from its own neglect or omission of duty, your verdict must be for the defendant."

We find no error in this. It was a fair presentation of the law as administered in this state. The rule is, we think, founded in sufficient reason and sound public policy. A short time since the supreme court stated the rule, in the case of the *Union Express Co. v. Graham*, 26 Ohio St. 595, in these words:—

"When a common carrier claims immunity for the loss of goods with

which he has been intrusted, on the ground that such immunity is secured by a special agreement, the burden is on him to prove that the loss was occasioned without his fault."

We have been requested to review this doctrine, in view of such respectable authorities as hold the contrary to be the true rule. We think the weight of authority is in accord with the holding in Ohio, and we do not think public interests would be advantaged by a change of the rule.

The judgment of the superior court of Cincinnati in special and general term affirmed.

SUPREME COURT OF THE UNITED STATES.

[OCTOBER TERM, 1876.]

BILLS AND NOTES. — EVIDENCE. — CONDITIONAL INDORSEER. — JUDGMENT. — ESTOPPEL.

DAVIS v. BROWN.

An indorser of a promissory note is a competent witness to prove an agreement in writing made with its holder at the time of his indorsement, that he shall not be held liable thereon, where the paper has not afterwards been put into circulation, but is held by the party to whom the indorsement was made.

The case of the *Bank of United States v. Dunn*, reported in 6th Peters, explained and qualified.

An agreement like the one mentioned above and the indorsement, taken together, are equivalent, so far as the holder of the note is concerned, to an indorsement without recourse to the indorser.

The omission of indorsers on a series of notes, transferred to the holder in settlement of their own note held by him, upon an agreement in writing that they should not be held liable on their indorsement, to set up the agreement as a defence to an action against them, brought by the holder on two of the notes, does not preclude them from setting up the agreement in a second action by the holder on others of the same series of notes. The judgment in the original action does not operate as an estoppel against showing the existence and validity of the agreement in the second action.

When a judgment in one action is offered in evidence in a subsequent action between the same parties upon a different demand, it operates as an estoppel only upon the matter actually at issue and determined in the original action; and such matter, when not disclosed by the pleadings, must be shown by extrinsic evidence.

MR. JUSTICE FIELD delivered the opinion of the court.

This was an action against the defendants as second indorsers upon ten promissory notes of one McOmber, made at Saratoga Springs, in the State of New York, in June, 1870, each for \$500, and payable to his order in from thirty-two to forty-one months after date.

The defence set up to defeat the action was that the notes in suit were transferred in June, 1871, with other notes of the same party of like amount and date, to the Ocean National Bank by the defendants, in part satisfaction of a note of their own then past due, the balance being paid in cash, and were indorsed by the defendants as a mere matter of form,

upon an agreement in writing of the bank that they should not be held liable on their indorsements, or be used thereon.

On the trial, Harvey Brown, one of the defendants, was called as a witness to prove the matters thus set up as a defence, and was permitted, against the objection of the plaintiff, to testify to the settlement of the note of the defendants, the transfer for that purpose to the Ocean National Bank of the McOmber notes, and their indorsement by the defendants under the agreement of the bank not to hold them liable as indorsers, and that this agreement was in writing, and was destroyed in the great fire at Chicago, in October, 1871.

To meet and repel the defence founded upon this agreement the plaintiff produced and gave in evidence a record of a judgment, recovered by him against the same defendants upon two other notes of the same party, of like amount and date as those in suit, except that they became due at an earlier day, which were part of the series of notes transferred by the defendants to the bank, and indorsed by them, in settlement of their own note, as already mentioned, and were included in the agreement as part of the same transaction.

The questions presented for our determination relate to the competency of the witness Brown, and the admissibility of the evidence of the alleged agreement of the bank, and to the operation of the judgment mentioned as an estoppel against the defendants setting up any defence founded upon the agreement.

The objection to the witness arose from his being a party to the notes, and as such, it is contended, that he was incompetent to impeach or discredit the same, or to show that his liability was not such as his indorsement imported. The case of *The Bank of the United States v. Dunn*, reported in the 6th of Peters, is cited in support of this position. There the indorser of a note had been permitted by the court below to testify, against the objection of the plaintiff in the action, to a verbal understanding with the cashier and president of the bank which took the note, that he was not to incur any responsibility, or, at least, would not be held liable on the note, until the security pledged for its payment had been exhausted. The admission of the witness this court considered erroneous, holding that no one who was a party to a negotiable note could be permitted by his own testimony to invalidate it, which in that case meant that no one could be permitted to show that a note indorsed by him was void in its inception, or that his indorsement did not impose the liability which the law attached to it. The opinion which announces the decision proceeds upon two grounds: 1st, that the evidence would contradict the terms of the instrument or change their legal import; and 2d, that it would be against public policy, as tending to destroy the credit of commercial paper, to allow one who had given it the sanction of his name, and thus added value and currency to the instrument, to testify that it was executed or indorsed by him under such circumstances as to impair his obligation upon it.

This last position was supported by reference to the celebrated case of *Walton v. Shelley*, in Durnford & East, 1 Term Rep. 296, decided in 1786, where the indorser of a promissory note was held by the king's bench to be inadmissible as a witness, on grounds of public policy, to

prove the note void for usury in its inception; Lord Mansfield observing that it was "of consequence to mankind that no person should hang out false colors to deceive them, by first affixing his signature to a paper, and then afterwards giving testimony to invalidate it." Aside from the assumed estoppel of the parties from their position on the paper, the maxim of the Roman law, that no one alleging his own turpitude shall be heard (*nemo allegans suam turpitudinem est audiendus*), was cited to justify the decision. That maxim was plainly misapplied here by the great chief justice, for it is not a rule of evidence, but a rule applicable to parties seeking to enforce rights founded upon illegal or criminal considerations. The meaning of the maxim is, that no one shall be heard in a court of justice to allege his own turpitude as a foundation of a claim or right; it does not import that a man shall not be heard who testifies to his own turpitude or criminality, however much his testimony may be discredited by his character.

The doctrine of *Walton v. Shelley* maintained its position in the courts of England only for a few years. In 1798 it was by the same court overruled in the case of *Jordaine v. Lashbrooke*, 7 Term Reports, 601, Lord Kenyon having succeeded Mansfield as chief justice. Since then, the rule has prevailed in the courts of that country, that a party to any instrument, whether negotiable or not, if otherwise qualified, is competent to prove any fact affecting its validity; the objection to the witness from his connection with the making or circulation of the instrument only going to his credibility and not to his competency. In this country, there has been much diversity of opinion upon the point, some of the state courts following the rule of *Walton v. Shelley*, while others have adopted the later English rule. The general tendency of decisions here is to disregard all objections to the competency of witnesses, and to allow their position and character to affect only their credibility. This diversity of opinion could not have existed unless there were grave reasons for doubting the soundness of the original decision. Be that as it may, it has led those courts which, on considerations of commercial policy, adopted the rule of *Walton v. Shelley*, to qualify the rule, so as to limit its application strictly to cases arising on negotiable bills and notes; and to cases where the transaction affecting the validity of the paper was not between the parties in suit. The holders of commercial paper, who enter into agreements or transactions with the makers or indorsers, affecting its validity or negotiability, cannot invoke protection against the infirmity which they have aided to create. There are no considerations of commercial policy which can exclude the parties in such cases from testifying to the facts. Thus, in *Fox v. Whitney*, 16 Mass. 118, the supreme court of Massachusetts, which had previously recognized the rule in *Walton v. Shelley*, held that the rule applied only to a case where a man, by putting his name to a negotiable security, had given currency and credit to it, and did not apply to a case between original parties, where the paper had not been put into circulation, and each of the parties was cognizant of all the facts. This decision meets our concurrence, and if it qualifies the decision in the case of *Bank v. Dunn*, we think the qualification a just and proper one.

These considerations dispose of the objection to the competency of the

witness Brown. The notes of McOmber were never put into circulation by the Ocean National Bank. No one, therefore, has been misled by the indorsement of the defendants; no false colors have been held out by them. No credit or currency has been given by their names. The receiver has, with reference to the notes, no greater right than the bank has; he stands in its shoes. If the bank could not have enforced a liability upon the defendants against its agreement that they should not be held liable, the receiver cannot enforce it. The agreement itself is not immoral nor illegal. The defendants by their act ran the risk of being charged upon the notes; they would have been liable had the notes been put into circulation. But beyond this risk they were protected by the agreement; upon that they could rely so long as the bank held the notes.

The objection that the agreement was inadmissible, because it tended to vary and destroy the legal effect of the indorsement, is not tenable. The agreement being in writing is to be taken and considered in connection with the indorsement, and the two are to be construed together. So far as the bank was concerned, the agreement made the indorsement equivalent to one without recourse to the indorsers.

The next question for determination relates to the operation of the judgment recovered by the plaintiff against the defendants, as an estoppel against their setting up the defence founded upon the agreement. The action in which that judgment was recovered was brought in the same court as the present action, against the defendants as second indorsers upon two notes, which were part of the series of McOmber notes, transferred to the bank of the defendants in settlement of their own note; and their indorsement was embraced in its agreement. The defendants pleaded the general issue, but the court finds that, by the advice of counsel learned in the law, they defended the action in good faith solely upon the ground that their liability had not been fixed as indorsers by due prosecution of the makers of the notes, as required by the laws of Illinois; and that this defence was not sustained, for the reason that it appeared that the makers of the notes resided in the State of New York, and that the indorsement was made there. The agreement of the bank not to hold them liable as indorsers was not pleaded nor relied upon; yet it is contended by counsel that inasmuch as it might have been thus pleaded and relied upon, therefore the judgment is an estoppel against the setting up of that agreement as a defence in a subsequent action between the same parties upon other notes, equally as if its validity and efficacy had been litigated and determined.

In taking this position, counsel have confounded the operation of a judgment upon the demand involved in the action in which the judgment was rendered, with its operation as an estoppel in another action between the parties upon a different demand. So far as the demand involved in the action is concerned, the judgment has closed all controversy; its validity is no longer open to contestation, whatever might have been said or proved at the trial for or against it. The judgment is not only conclusive as to what was actually determined respecting such demand, but as to every matter which might have been brought forward and determined respecting it; and that is all that the language means which is quoted

by counsel from opinions in adjudged cases, in seeming consonance with his position.

When a judgment is offered in evidence in a subsequent action between the same parties upon a different demand, it operates as an estoppel only upon the matter actually at issue and determined in the original action; and such matter, when not disclosed by the pleadings, must be shown by extrinsic evidence. We have recently had occasion, in the case of *Cromwell v. Sac County*, Am. L. T. Rep. June, 1877, to go over this ground and point out the distinction mentioned; and it is unnecessary to repeat what we there said. See Bigelow on Estoppel; Note to the *Case of the Duchess of Kingston* in Smith's Leading Cases; and Robinson's Practice, vol. 7. The position of counsel is clearly untenable.

As to the objection of want of authority in the president of the bank to make the agreement with the defendants, the finding of the court is conclusive. His authority was a fact to be determined by the court, under the stipulation waiving a jury, and we do not sit in review of questions of fact.

Judgment affirmed.

Mr. Justice CLIFFORD dissented.

COURT OF APPEALS OF KENTUCKY.

[JUNE, 1877.]

OF THE IMPEACHMENT OF JUDGMENTS IN COLLATERAL PROCEEDINGS.

NEWCOMB'S HEIRS v. NEWCOMB.

While it is well settled that the judgment of a court of general jurisdiction cannot be impeached collaterally, if it appears in a collateral proceeding that there was no citation or summons, when there should have been, the judgment will be held to be void. Plaintiff, whose wife was insane and confined in an asylum out of the state, procured a decree of divorce, without summons or citation, in pursuance of the letter of certain statutes which provided that jurisdiction could be obtained by publication. Held, that it was competent to show in a collateral proceeding that the decree of divorce was obtained without the wife being legally cited to answer, and that upon proof of the fact the decree would be treated as null and void.

THE facts are stated in the opinion.

John Roberts, Barr, Goodloe & Humphrey, and Harlan & Wilson, for appellants.

John Mason Brown, M. C. Johnson & Isaac Caldwell, contra.

PRYOR, J. The appellee, Cornelia W. Newcomb, by her next friend, J. L. Danforth, instituted the present action in equity in the Louisville chancery court on the 2d of March in the year 1875, in which it is alleged that she is the widow of Horatio W. Newcomb, deceased, and as such entitled to dower in the realty owned by him at his death, and her distributable share of his personal estate; that her husband left a large and

valuable estate, and a last will and testament, by which he made various devises to his children, and to others therein named, all of whom, together with the executors, are made defendants to the action. It is further alleged that she is a person of unsound mind, but has never been adjudged a lunatic, and has no committee.

By the provisions of the will, the appellee has secured to her an annuity of \$2,500 during her natural life. This she declines to accept, and, through her next friend, elects to renounce the provisions of the will made for her benefit, and asks the chancellor, inasmuch as she is disabled, from mental infirmity, from complying with the statute in making a written renunciation, to make it for her. She asks for a judgment allotting dower and her interest in the personalty.

The husband died in August, 1874. Prior to his death, on the 24th of April, 1871, on his petition filed in the Louisville chancery court, a decree was entered divorcing him from the present appellee (Cornelia W. Newcomb), and restoring him to all the rights and privileges of an unmarried man. Shortly after this divorce he married Mary C. Smith, and had by her two children. He devised to these two children and their mother about four hundred thousand dollars, and also made them residuary devisees with his son, Victor Newcomb, the only surviving child of the first marriage, to whom the will recites he had previously advanced four hundred thousand dollars. The construction of the will, and the rights of the parties under it, are not, however, involved in this litigation. Mary C. Newcomb and her two children are parties (appellants) to this record.

The appellants pleaded the record of the proceedings by which the divorce was obtained in the year 1871 as a bar to appellee's recovery, and upon that record arises the principal question in this controversy. The court below granted the relief by giving to the appellee her dower and distributive share of the personal estate. From the record in the divorce case, as well as the present action, it appears that the appellee and Horatio W. Newcomb were married in the city of Louisville on the 23d of June, 1838, and lived together as husband and wife until the year 1852, when the appellee became a lunatic, and was taken by her husband to an asylum for the insane, located in Somerville, Mass., where she has continuously remained, and was there living at the institution of this action.

There was never any inquest of lunacy held, or any judicial finding of that fact; but it clearly appears, from the evidence, that she is a confirmed lunatic, and that such has been her mental condition since she was placed in the asylum.

The husband continued to reside in Louisville until his death in 1874. The decree divorcing the parties was rendered under the Act of 1865, providing "that courts of chancery jurisdiction may decree a divorce to both husband and wife, as an additional cause to those named in said section (chapter 47, article 3, section 1, Revised Statutes), for lunacy and unsound mind, of confirmed and incurable character, and not less than three years' continuance, to be established by the testimony of those skilled in mental maladies, and other proof; and upon granting the divorce shall protect the property interest of the person of unsound mind; and, in case of a wife, provision shall be made for her out of her husband's means."

Section 2 of the act makes it the duty of the court to appoint a guardian *ad litem* for the lunatic, who shall be a member of the bar, and skilled in the law, and who shall be sworn to faithfully and honestly discharge his duties. Section 3 provides that "no divorce shall be granted under this act, except in cases where the lunacy or unsoundness of mind was the result of intemperance or hereditary taint of insanity, which was concealed from the party at the time of the marriage, nor until the questions of fact shall be tried by a jury; nor shall the divorce be granted until and unless the chancellor shall enter on the record that he has heard all the testimony, and that, in his opinion, the judgment is sustained by the evidence."

On the 26th of January, 1871, by an amendment to this act, the court, at its discretion, might dispense with a jury. Under the provisions of these several enactments, the appellee was proceeded against by her husband as a non-resident or absent defendant, and a warning order entered requiring her to appear and answer the complaint within sixty days. An attorney or guardian *ad litem* was appointed to defend for her, and the chancellor, upon the facts, rendered the judgment without the intervention of a jury. Before a warning order could be made by the clerk under the Code of Practice in force at the institution of the action, an affidavit was required to be made by the plaintiff and filed in the clerk's office, setting forth the grounds or some of them, designated by the Code authorizing proceedings by constructive service. Among those grounds is, "that the defendant is a non-resident of this state;" the defendant has been absent from this state four months. Civil Code, section 88. The court may also make the warning order upon the requisite facts being shown by the affidavit of other than the plaintiff or his attorney. Civil Code, section 89. The warning order was entered in this case in court, and the appellee proceeded against either as a non-resident or absent defendant. The affidavit showing the facts upon which the warning order was made does not appear in the record of the action for a divorce, nor does it appear that any such affidavit was made. Counsel for the appellee now insist, as they did in the court below, that the decree of divorce is void for the following reasons:—

First. There was no affidavit of the non-residence or statutory absence of the appellee.

Second. The husband having placed his wife in the asylum, and being under his control and subject to his will, she was neither a non-resident nor absent in the sense of the statute so as to authorize a constructive service; that the domicil and residence of the husband was the domicil and residence of the wife, and actual service was necessary.

Third. The appellee was entitled to have the question of her lunacy passed on by a jury.

The court below, in the opinion delivered, assigned as one of the grounds for determining the judgment void, the absence from the record of the affidavit required by the Code showing the appellee to have been a non-resident or absent from the state four months; that neither the clerk nor the court had the authority to make the warning order without such an affidavit. There can be no question as to the necessity for such an affidavit before the entry of an order warning the defendant to appear

and answer. The important inquiry arising on the first objection is not as to the authority of the court to enter the warning order, which is the constructive summons; but as the warning order has been entered, and the judgment rendered by a court of general jurisdiction, must it not be presumed that all the preliminary steps had been taken necessary to make the warning order valid? That the court had jurisdiction of the subject matter is not controverted, and having warned the appellee to appear, can it be presumed or adjudged, in a collateral proceeding like this, that the warning was given without regard to the provisions of the Code on that subject?

The general doctrine established upon this point, and sustained by an almost unbroken chain of adjudication, is to the effect, that where the record shows the service of a summons, whether actual or constructive, it imports absolute verity, or where the judgment shows that the parties appeared, or due notice having been given, the judgment is conclusive until reversed or vacated by some direct proceeding. The presumption is always indulged in favor of the jurisdiction of courts of general jurisdiction, and they cannot be assailed in collateral proceedings and adjudged void, for the reason that the evidence of some preliminary step to be taken in the inception of the action is not found among the files of the clerk in whose office they are required to be kept. This doctrine applies to such tribunals acting under the same sovereignty, public policy requiring that such judgments should be regarded as long as they remain on the record unimpeached and unreversed. "Being domestic judgments, they can, if erroneous, be reviewed by proceedings instituted for that purpose, and reversed on error or by a new trial; and if the danger is imminent, relief can be temporarily, if not finally, obtained in a court of equity. The general good clearly requires, and has therefore established the rule, that domestic judgments of courts of general jurisdiction cannot be attacked collaterally." Freeman on Judgments, page 131, and authorities cited.

But few adjudications are to be found opposed to this wise and just rule, and it may be regarded as the well-established doctrine on the subject. *Pratt v. Dow*, 56 Me. 81; *Yaple v. Titus*, 41 Penn. St. 202; *Shawhan v. Loller*, 24 Iowa, 217; *Cook v. Darling*, 18 Pick. 393; *Carpentier v. Oakland*, 30 Cal. 43; *Coit v. Haven*, 30 Conn. 190. It is needless, however, to pursue the inquiry farther, as to the validity of domestic judgments, the point in this case being, whether the affidavit is a part of the summons or its connection with the record so indispensable as to render the judgment void in its absence.

Section 91 of the Civil Code provides that the warning order is a constructive service. "A defendant against whom a warning order is made shall be deemed to have been constructively summoned on the thirtieth day after making the order, and the action may proceed accordingly."

It is maintained by the appellee that because the record is silent as to the evidence upon which the constructive service was had the judgment rendered is a nullity, and the authority mainly relied on in support of the position is the case of *Galpin v. Page*, reported in 18th Wallace, where, in the application of the rule being discussed, a distinction is attempted to be drawn between the judgments of superior courts, where the persons

over whom jurisdiction is claimed are within the territorial limits of the court, and cases where the judgment is against those outside of the territorial limits.

After a careful consideration of that case, and the authority as well as the reasoning upon which it is based, we cannot recognize the distinction. It is a well-settled rule, so far as scarcely to be questioned, that a domestic judgment rendered by a court of general jurisdiction cannot be collaterally attacked unless the want of jurisdiction appears upon the record. Courts differ as to what facts constitute a want of jurisdiction, but nearly all concede the general doctrine. This rule is established upon grounds of public policy as the main security to the rights of person and property, and, as said by the court in the case of *Coit v. Haven*, *supra*, "It will not be claimed that when a court has jurisdiction its records speak absolute verity, because it is the record of the court's action. It is necessary that confidence should be reposed in courts of a high character as well as in the records of such courts. It is the only safe rule to give the decisions of courts of general jurisdiction full effect so long as they remain in force, rather than to leave them open to be attacked in every way and on all occasions."

This mode of reasoning is found in nearly all the cases on the subject, and the doctrine fully recognized in the case of *Galpin v. Page*, when applied to domestic judgments, or rather to judgments against parties within the territorial jurisdiction of the court.

If the rule is established by reason of the public good, and to maintain confidence in the administration of justice by courts of general jurisdiction, why should it not apply to the non-resident as well as the resident? It is not denied that civil proceedings may be had by constructive service affecting the personal and property rights of a non-resident; and there is the same necessity for protecting the property interests acquired under such a judgment that there is when all the parties reside within the state in which the judgment is rendered. While state sovereignty is confined to its territorial limits, and one state may not give the same effect to a judgment rendered in another state that it would to one pronounced by its own tribunals, still, when the validity of a judgment is questioned in a state where it was rendered, we see no reason for making an inquiry for the purpose of ascertaining whether the judgment was rendered against a resident or non-resident. In either case it is a domestic judgment, and the same presumption must be indulged as to the jurisdiction.

Since the organization of judicial tribunals within the commonwealth, non-residents have been proceeded against by publication and orders of warning, and the mode of bringing parties before the court who are non-residents, in cases affecting their rights, is the constant practice of all the courts of general jurisdiction. If the absence of an affidavit from the record as to the non-residence of the defendant is to render the judgment void, it would not only work incalculable mischief by rendering uncertain and insecure the title to all property acquired under such proceedings, but would, in effect, overturn the well settled rule of practice in this state on the subject. The non-resident, except in a judgment of divorce, may prosecute an appeal; may file his petition for a new trial; and, by an express provision of the statute, is allowed five years from the rendition of

the judgment in which to appear, file an answer, and move for a retrial. Under the Act of 1815, authorizing proceedings against unknown heirs, it was provided that, before the issuing of process, or making an order of warning (which was by publication) against such heirs, the complainant should file in the clerk's office with his or her bill an affidavit *that he or she did not know the names of such heirs*. In the case of *Hines v. Oldham*, reported in 3d Monroe, page 266, the lessor of the plaintiff, in an action of ejectment, offered as evidence in support of his title a decree of the Grayson circuit court, together with a conveyance made to him by the commissioner of the lands in controversy. It was objected to by the defence, on the ground that the proceedings under which the decree was obtained were against the unknown heirs of White, and Ramey, a non-resident, and there was no affidavit annexed to the bill as required by the statute. This court said on the appeal in that case: "The affidavit was expressly required by the statute, and the want of it would have been fatal on demurrer. The distinction between the legal effect of a void judgment or decree, and of one merely erroneous, is founded in good reason, &c., but by what criterion we may distinguish the one class of decrees from the other is not so clear. It may, however, be laid down as a general rule, that, wherever the court rendering the judgment has not jurisdiction, or, if rendered against a person in his absence, without having the warning which the law requires, the decree or judgment shall be void; but if the court has jurisdiction, and the person against whom the judgment has been rendered has appeared, or has had the warning which the law requires to authorize the judgment in his absence, the decree or judgment, however defective in other respects, will be erroneous merely, and not void for the want of an affidavit," &c.

The same principle was recognized in the case of *Benningfield v. Read*, 8th B. Mon. 102. The warning order was there regarded as the summons, and by section 90 of the Code, already cited, it is expressly declared to be such. We cannot perceive the distinction attempted to be made between a proceeding under the statute of 1815, and a proceeding under the Code. The remedy or character of process and service is in each case prescribed by statute. In the case of *Brownfield v. Dyer*, reported in 7 Bush, it appeared from the record that the order of warning made was not authorized by the Code. It was, in fact, no warning, as was clearly shown from an inspection of the record itself. The record disclosing a want of jurisdiction, it was held that the judgment was void. In the cases of *Green's Heirs v. Breckenridge*, 4th B. Mon., and *Blight's Heirs v. Hanks*, 6th Ibid., the records disclosed a want of jurisdiction, and no presumption will be indulged contrary to the facts the record itself develops. The case of *McLaughlin v. Ball* (MS. opinion) is the only authority of this court conflicting with the views here presented. The warning order in that case was made by the clerk, a mere ministerial officer. The question was involved in a direct appeal, and while the proceeding was erroneous, we are not inclined to say that it was void for the want of an affidavit.

In the case of *Long v. Montgomery*, 7th Bush, it appeared from the record that the sheriff's return was indorsed *executed*, without any signature, and although the judgment recited that the party appeared, this

court held, no doubt from the exhibition of the officer's return, that the recital was merely formal, and determined the judgment void. In the absence of any summons in the record, with such a recital as that the party appeared, or was duly served, and a judgment, such a judgment would not be determined void in a collateral proceeding; and if considered as error, can be remedied only by an appeal. In the case of *Hahn v. Kelly*, 34 California, 319, we find this language in regard to presumptions in favor of judgments rendered by courts of general jurisdiction: "Not universally, but frequently, we find the words superior courts accompanied by the phrase, *proceeding according to the course of the common law*." What does this phrase mean? Does it operate as a limitation on the rule? Does it mean that when a superior court is proceeding according to the rules and practice of the common law, its jurisdiction will be presumed, but when it is proceeding according to the rules and practice prescribed by the statute, its jurisdiction will not be presumed, but must be shown? Does it mean that the same court is superior or inferior according to circumstances? That it is superior when it works according to the common law, and inferior when it works according to the statute law? If it does, what is the reason upon which the distinction is founded? There is no force in the suggestion that the court is exercising a general power when obtaining jurisdiction by actual service, and a limited or special power when doing so by constructive service. The distinction is not as to the power, for the power is the same in both cases, but merely as to the mode of exercising it. The reasoning for indulging a presumption in the one case applies with like force to the other.

The proceedings of the courts of this state are not conducted according to the course of the common law, but regulated by the Code of Practice, and, in regard to judgments of courts of general jurisdiction within the state, the same presumptions must be indulged in, whether the judgment or proceedings follow the common law or are regulated by statute, unless the statute prescribes a different rule for determining the validity of the judgment. For the reasons given, we cannot concur with the court below that the absence of the affidavit from the record renders the judgment void. The presumption is, that the warning order was entered by the court as provided by the Code.

The question more difficult of solution than all others made in this case, comes from the second objection taken by counsel for the appellee to the validity of the judgment of divorce. Was the appellee amenable to constructive service when confined in an asylum in a distant state by her husband, and at the time under his control? And is parol evidence admissible in this collateral proceeding to establish these facts, for the purpose of avoiding the effect of the judgment? That she was in the asylum in obedience to his command, in actual confinement, without the power or even will to resist at the time the warning was entered and the judgment rendered, is an admitted fact. It must be conceded that the husband was influenced by no improper motive in placing his wife in this asylum, but, on the contrary, much of his time and fortune were contributed in the effort to relieve his wife from her unfortunate mental condition, and, when it was ascertained that she was in a state of incurable insanity, he still continued, out of his abundant means, to furnish everything neces-

sary to alleviate as far as possible her mental and physical suffering. Considerations of this sort, however, cannot control the decision of the questions before us. The principle governing this case cannot be regulated by the good or evil intent of her husband, or by the mental condition of his unfortunate wife.

Recognizing the general doctrine that judgments of courts of general jurisdiction are not the subject of an attack in a collateral proceeding, it becomes necessary to determine whether this rule, or the reasons upon which it is based, is to be applied to the case before us. The rule had its origin from motives of public policy, sustained, as all the authorities con-
duce to show, by the additional reason that the party aggrieved has every opportunity afforded him for redress if wrong has been committed. He may appeal, move to set aside the judgment, or for a new trial, so long as the court rendering the judgment has any control over it. He may file his petition to review the judgment, or a petition for a new trial. Such proceedings the policy of the law requires he shall adopt, and will not permit collateral attacks upon such judgments, when they may be offered as evidence or relied on as the final termination of the rights of the parties. We have already adjudged that upon the face of the record in this collateral proceeding it must be presumed that the appellee has had her day in court in the action for a divorce.

The representatives and devisees of the husband are now relying on the judgment rendered in that action as a bar to the appellee's recovery. Will she be allowed to show in this proceeding that the record is false and the judgment void?

That an order of warning in certain cases cannot be made so as to render the judgment valid, although all the proceedings on the face of the record appear proper, is now well settled. In the case of *Dean v. Nelson* (reported in 10th Wallace, 158), Dean had obtained a judgment foreclosing a mortgage executed by Nelson and wife. Some stock owned by Nelson and wife in a gas company was purchased by Dean at the sale made under the judgment. Nelson was proceeded against as a non-resident by an order of publication, and at and before the time he was warned to appear and answer he was within the Confederate lines — had been expelled from the State of Tennessee (where the judgment was rendered) by the military commander, and forbidden, by a published order, from returning. He had no opportunity of making any defence, and was prevented by the military order from coming within the federal lines. At the close of the war Nelson and wife instituted an action against Dean to recover the stock. Dean pleaded as a bar the judgment obtained upon the order of publication in the action against Nelson as a non-resident. Nelson's petition was dismissed, and, on an appeal to the supreme court the judgment was reversed. That court said: "The publication (the warning) was a mere idle form; the defendants could not lawfully see or obey it. As to them the proceedings were wholly void and inoperative." From the report of that case there seems to have been no direct attack upon the judgment by any amended pleading, and the case heard alone upon the bill, answer, and proof.

This case was followed by the case of *Lasen v. Rochreal*, reported in 17th Wallace. Lasen was expelled by a military order from his home in

New Orleans, and whilst absent the appellee foreclosed a mortgage upon Lasen's property and had it sold. After Lasen's return to New Orleans he instituted an action against the purchaser and others to vacate the judgment, and the court dismissed his petition. On an appeal, the supreme court said: "It is contrary to every principle of natural justice that any one should be condemned as to person or property without being heard." Quoting from *Dean v. Nelson*: "They could not lawfully see or obey the summons. As to them, the proceedings were wholly void and inoperative. The case thus condemned is substantially the case before us." Other cases might be cited sustaining the doctrine that no one can be deprived of his personal or property rights without being first heard. Such a plain principle of natural justice requires no authority to support it. In the cases referred to, it is true that the judgments were assailed by a direct proceeding, except the case of *Dean v. Nelson*. Adjudications are not wanting, however, sustaining the doctrine that parol evidence may be admitted in collateral proceedings assailing judgments of superior courts. That whenever a right is asserted under such a proceeding the facts showing the judgment void may be established by proof denying the verity of the record. Upon investigation, it will be found that a large majority of those cases have reference to judgments rendered in other states,—that is, where parties are attempting to enforce the judgment of a tribunal rendered in a state other than that in which the judgment is being assailed. Such was the case of *Starbuck v. Murray*, reported in 5 Wendell, 148, and regarded as a leading case on the subject. The judgments of one state, when sought to be enforced in another state, are not regarded as domestic judgments; and when the jurisdiction of the court to render such a judgment is assailed, that question (of jurisdiction) is always open to inquiry. It is only when the jurisdiction of the court in another state is not impeached, either as to the subject matter or the person, that the record of the judgment is entitled to full faith and credit. *Thompson v. Wutman*, 18 Wallace; Story on the Conflict of Laws. We are not disposed to apply such a doctrine to domestic judgments. The safer rule is to require the party to appeal, apply for a new trial, or file his petition to vacate the judgment.

By an act of the legislature, approved March 9, 1869, the Code of Practice was amended as follows: "That section 445 of the Civil Code of Practice shall not apply to judgments granting a divorce, so far as the divorce itself is involved, nor shall section 373 apply thereto. Section 373 of the Code permits a party, where grounds for a new trial are discovered after the term at which the verdict or decision was entered, to file a petition for a new trial. This is limited to three years. Section 445 of the Code allows a defendant against whom a judgment is rendered, upon constructive service, to appear in court at any time within five years and move to have the action retried. Section 16 of the Civil Code denies the defendant the right of an appeal to this court from the judgment granting a divorce. So the appellee in this case, by reason of the Act of March 9, 1869, is denied the right to petition for a new trial; is denied the right (if a non-resident) to appear within five years and move to retry the case; and, by section 16 of the Code, has no appeal. When she appears in court, and, by petition, asks for a new trial, the law forbids it; when she

asks an appeal it is denied her; and, lastly, when the judgment she desires to assail is interposed to divest her of what she claims to be her right of property, she is told that parol evidence is inadmissible to show that a domestic judgment is void. Can such a case be brought within the rule by reason of public policy? The defendant denied a hearing? The most important relation in life severed by means of a void judgment, and the party wronged without remedy? In such a case, the reasoning of the court in the case of *Starbuck v. Murray*, *supra*, might well apply. No rule will be allowed to violate every principle of natural justice by depriving the sane or insane of the rights of person or property without a hearing. Every one whose rights are to be affected by a judicial proceeding must have his day in court. This is one of the fundamentals of the law, and when a judgment has been rendered without citation or summons, there must be some remedy afforded the party complaining.

It is argued by counsel for the appellants that the Act of 1865, creating additional grounds for a divorce, is a law within itself, and that no service on the appellee or citation was necessary. This position is not tenable. The act is only an amendment to the original statute on the subject giving additional causes for a divorce, and providing additional safeguards for the protection of the defendant. It does not profess to change the practice in civil cases, nor prescribe any other mode of getting the defendant before the court than is found in the Civil Code. The action for a divorce is a civil proceeding. A civil action is commenced by filing, in the office of the clerk of the proper court, a petition, and causing a summons to be issued. Whatever might have been the practice before the adoption of the Code, it is now the settled rule; and we know of no exception, that whenever it is necessary to make one a party defendant to an action, it is equally as necessary to have him before the court by an appearance or the service of process, actual or constructive. Under our present practice, no guardian *ad litem* can be appointed for an infant until he is served with process, nor can one be appointed to defend for a lunatic until he is served. The Code of Practice makes no provision in regard to lunatics, except those who have been judicially ascertained to be of unsound mind. Prior to the adoption of the Code, judgments have been sustained against infants without service, where a guardian *ad litem* had been appointed, and so in regard to lunatics where there had been a service on the committee. The committee had the care and custody of the infant's property, and for that reason, doubtless, the practice prevailed.

It is further insisted by counsel that, as the institution of marriage more deeply affects the state than the rights of individual parties, and as the rights growing out of that relation are subject always to be changed or destroyed by the sovereign will, the state is the controlling party in interest, and the safeguards provided by law for the protection of the defendant, and particularly the helpless and inoffensive, indicate clearly that the decree of divorce is to be regarded as the expressed sovereign will, and cannot be disturbed or annulled except by the consent of the parties as provided by the statute. That for this reason an appeal is denied, and a new trial refused in such cases. When the present Constitution of Kentucky was adopted, the legislative department of the government was divested of that exercise of sovereignty by which the institution of mar-

riage was practically made one of convenience only, liable to be dissolved at the instance of one of the parties to the contract, and for reasons that were left alone to legislative discretion. By section 72, article 2, State Constitution, it is provided "that the general assembly shall have no power to grant divorces, &c. . . . but by general laws shall confer such power on the courts of justice."

The legislature, regarding the contract of marriage as higher and more sacred than ordinary contracts, provided the means by which parties interested in the preservation of the marital relation might be protected. It was never contemplated that the effort to maintain this relation by the enactment of proper laws should be construed as transferring to the judiciary a legislative discretion, that, when exercised and resulting in a judgment for a divorce, can never be questioned.

We are not prepared to adjudge that the legislature of the state can delegate to the judiciary such unlimited power over the subject—the power to divorce for any cause, or to dissolve the relation without notice or citation to the parties in interest. The mind of the chancellor would revolt at such a judicial proceeding. The state is equally as much interested in preserving the marital relation as it is in maintaining the judgment of a court dissolving it. When parties come into a court of justice, the right to a divorce is purely a judicial question; and, if the judgment dissolving the relation is void, it must be so treated.

In the case of *Meyar v. Meyar*, 3d Met., the party divorced married shortly after the judgment was rendered. The wife, who had been proceeded against as a non-resident, afterwards appeared in court, filed her answer, and moved for a retrial of the cause. This was prior to the Act of 1869, and there was at that time no law denying the defendant in a divorce case the right to apply for a new trial. The same objection was made in that case now urged here: that the party had again married, the judgment was final and conclusive, and no court had the power to disturb it.

This court in that case said: "Neither reason nor policy demands that judgments of divorce should be exempt from the general law applicable to new trials. The law does not favor divorces, and there is special reason for affording to courts having jurisdiction in such cases every possible means of preventing frauds and correcting any error or injustice committed in the judgment that may be complained of. No appeal lies from a judgment of divorce, and, unless the wrong done can be righted by the court committing it, the party injured is without redress."

The case of *McGuire v. McGuire*, reported in 7th Dana, was a proceeding under the statute of 1809, authorizing decrees of divorce for certain causes. The husband against whom the suit was entered was at the time domiciled in the State of Alabama. He had never been domiciled or a resident of this state. A decree of divorce was rendered, and the right of property as between the husband and the wife determined. The case being in this court for revision, the court (Chief Justice Robertson delivering the opinion) said: "There can, we think, be no objection to the manner in which the chancellor divided the estate if he had authority to divorce the parties; but if he had no such authority, the decree concerning the estate was erroneous and should be reversed."

The court also in that case discussed the sovereign power of the state over the marital relation, and its dependency upon the sovereign will, but proceeded to say, "That the chancellor had no jurisdiction to dissolve the marriage contract;" and, further, "the chancellor's decree, being extra judicial, must be deemed void here as well as elsewhere." The decree as to the property was reversed, and the appeal as to the divorce dismissed for want of revisory power. These cases are cited to refute the idea that the state, being more interested in the marital relation than the parties to the contract creating it, a decree dissolving the relation is binding, although no jurisdiction is had over the person of the defendant to the action. If the decree in that case was void, in a collateral proceeding between the husband and wife, or those claiming under them, affecting their property rights, this court would necessarily have held that the judgment of divorce was void, and did not alter the *status* of the parties. In that case the want of jurisdiction appeared from the record.

The evidence in this case shows that the appellee was never ascertained to be a lunatic by any judicial finding; that she was confined in the asylum by her husband; that she was there in obedience to his command, and subject alone to his control, at the institution of the action for a divorce, and when the judgment was rendered; that the domicile and residence of the husband was in the State of Kentucky from the time of their marriage until his death. Under such circumstances she was, as to the husband, neither an absent defendant or non-resident in contemplation of the statute authorizing constructive service; and if she is to be regarded as having been a non-resident, having been in the custody of the husband, and in a place where she could have made no response if she had desired to do so, the service was void. She was warned, but could make no answer, except by the permission of the party warning her.

The husband may no doubt change the actual residence of the wife, so as to authorize strangers to proceed against her as a non-resident, or the wife may voluntarily abandon the husband and take up a residence elsewhere, that would authorize such a proceeding; but when the wife is absent in obedience to the command of her husband, or is so confined by him in an asylum or other place, with no power to return or respond to a summons or order of warning, she cannot be proceeded against by the husband as a non-resident or absent defendant. It matters not how pure the motives of the husband may be; if he can proceed in this mode against a lunatic wife, he can against one who is sane. If the wife had been sane, can there be any question as to the correctness of the judgment? Where is the rule, other than that prescribed by the Code, by which the chancellor, in determining the effect of the service of a summons in a civil action, is to be controlled by the mental condition of the party affected by it. If under his control, and subject to his will, the wife is placed by her husband where she is powerless to respond, if she had the mental power to assert her rights, the chancellor will not stop to inquire whether she was a lunatic or of sound mind, but must pronounce all such proceedings null and void.

In the investigation of this case we have not lost sight of the public interests in the questions involved, or its importance to the parties directly interested. The children (appellants) are made legitimate by the statute,

and the right of property is affected only to the extent that they may be compelled to contribute to satisfy the judgment in favor of the appellee; nor could this court have interfered with the judgment below, if there had been no statute on the subject. The law must be administered as we find it.

We also concur with the court below that a trial of the issues of fact by a jury in the divorce case could be dispensed with by the chancellor; and, if the trial by jury can be deemed a constitutional right in such a proceeding, the failure to direct such a trial in a civil action does not render the judgment void, but merely erroneous. Cooley's Const. Limitations, 410.

The preliminary question raised by counsel for the appellants, as to the right of a person of unsound mind to institute an action by her next friend, was also properly decided. The action was really in the name of the appellee, although the name of the *prochein amy* appears, and, having no committee, never having been found a lunatic by any judicial proceeding, the chancellor very properly permitted the action to progress, and, upon the refusal of the next friend to act, would have appointed some one to conduct the prosecution for her. It is also insisted that as the appellee is incapacitated from making an election as to whether she will hold under the will or against it, the chancellor, if required to make the election for her, should determine to abide by the provisions of the will, and require her to take the annual sum of \$2,500. Having declared the decree of divorce void, the rights of the appellee become fixed.

This provision of the will could not have been made in lieu of dower, and the chancellor has no power to divest the appellee of her legal rights. The appellee is entitled to dower and distribution in her deceased husband's estate, and the judgment below must be affirmed.

DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

[APRIL, 1877.]

ADMIRALTY. — COLLISION. — DUTY OF STEAMER AND SAILING VESSEL.

MARSHALL v. THE ADRIATIC.

Where the vacillation of a sailing vessel in the exhibition of her lights is the cause of a collision with a steamer, the steamer held not to have been in fault, even though the collision might have been avoided if the steamer had adopted a course different from that pursued.

THE facts are stated in the opinion.

Thomas B. Stillman & Henry J. Scudder, for the libellants.

Everett P. Wheeler & Joseph H. Choate, for the claimants.

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BLATCHFORD, J. On the 30th of December, 1875, the ship *Harvest Queen*, an American vessel, belonging to the libellants, with a cargo on board also belonging to them, set sail from the harbor of Queenstown, in Ireland, for Liverpool, in England. The steamer *Adriatic*, a British vessel, sailed from Liverpool for New York, on the same day, and proceeded down the Irish Channel. The libel alleges that when the ship was distant about fifty miles from her place of departure, and was proceeding up the Irish Channel, the wind blowing a stiff breeze from about southwest, and the weather being clear starlight, she was run into by the steamer at about three o'clock A. M., on the 31st of December, the steamer striking the ship on her port bow, with such violence as to cause her, with her cargo, to sink in a very short time after the collision; that, by said collision, the ship was totally lost, and her master and officers, and all hands on board of her, were lost; that, prior to, and at the time of, the collision, the general course of the ship was up, and the general course of the steamer was down, the Irish Channel, and their courses crossed but slightly, if at all; and that the collision was caused by the negligence and improper conduct of those on board of the steamer, in not having a good and sufficient lookout, in running at too great a rate of speed, in not keeping out of the way of the ship, and in not stopping and backing in time to avoid the collision. The libellants claim to recover against the steamer, as damages sustained by the collision, the sum of \$225,000.

The answer of the steamer avers that the ship was either sunk by a collision with some other vessel than the steamer in the Irish Channel, on or about the 31st of December, or was wrecked on or about that day in said Channel, and that her loss was caused thereby, and not by any collision with the steamer. Without discussing in detail the evidence on the subject, it is sufficient to say that it leaves no doubt in the mind that the steamer, at or about the time and place charged, came into collision with the ship *Harvest Queen*, belonging to the libellants, in such manner and with such results as to cause the sinking and loss of the ship and of her cargo, and of every person on board of her.

The material question in the case to be determined on the evidence is, as to whether the steamer was in fault. The vessels were sailing on nearly opposite courses. The steamer was heading from west one quarter north to west one half north. The ship was heading about east by south half south. They were thus drawing on to the courses of each other from one point to one point and a quarter. The ship was sailing at the rate of from eight to nine knots an hour, and the steamer at the rate of about twelve knots. The steamer made the green light of the ship at about two points on the starboard bow of the steamer. The red light of the ship was not then visible to the steamer. The white and green lights of the steamer, and not her red light, ought then to have been visible to the ship, and undoubtedly were, and it was her duty to heed them. Under the circumstances thus existing, it was the duty of the steamer to keep out of the way of the ship, and it was the correlative duty of the ship to allow the steamer to keep out of her way, and not to embarrass or hamper the steamer in performing such duty. The position was one of safety. The green lights of the two vessels, and only those, were exposed to each other.

There was no exposing of green to red. Under this condition of things, the steamer kept on her course, neither porting nor starboarding, nor slowing nor stopping, nor reversing. It was proper for her so to keep on her course. She had a right to presume that in the presence of her exposed green light, the ship would continue to expose her green light and that only. There was no obligation on the steamer then to starboard, because the vessels were at such a distance apart, probably two miles, that if both kept their courses, the ship was certain to pass clear, on the starboard hand of the steamer. She would draw more and more on the starboard bow of the steamer. And such was the fact. The ship's green light opened more to the starboard of the steamer, until it got to some three and a half points on the starboard bow of the steamer. This was a position of safety. The ship would not reach the path of the steamer until she was astern of the steamer. At this juncture, and some four minutes after the ship's green light had first been seen by the steamer, the ship shut in her green light, and exposed her red light. All the time before that she had exposed her green light, and that alone, steadily, with no glimpse of her red light. Here, then, arose an exigency. Here was danger. The first officer of the steamer, Mr. Bence, was on her bridge, watching the green light off his starboard bow. He had charge of the steamer at the time, and was responsible for her navigation. He had seen the green light for four minutes, and had seen it thus open more on his starboard bow. He could not tell to what species of craft it belonged, whether to a fore and aft vessel, which could sail within five points of the wind, or to a square-rigged vessel, which could not sail nearer to the wind than from six to seven points. He saw a movement in the approaching vessel, indicated by the change in her lights, which it was reasonable and proper for him, under the circumstances, to take as evidence of her intention to throw herself across his onward path. He was called upon suddenly and in an exigency, to determine whether he would do anything, and, if something, what? He could, as to the course of his vessel, do one of three things — either let it remain as it was, or starboard, or port. He ported. The libellants insist that he erred in porting; that, if he had not ported, there would have been no collision; that he ought to have starboarded, or at least have kept on the same course; that if he had even kept his course there would have been no collision, as the ship could not have reached his path ahead of him; and that if he had starboarded he would certainly have sailed away from all danger. It is easy to criticise and to be wise after the event. Mr. Bence seems to have been a good seaman, of experience and capacity, watchful, thoughtful, and deliberate. Much must be left to the judgment of such a man, charged with the safety of a large steamer, and of the lives of those on board, as to which one of two or more methods he will adopt in a given exigency, if it is not shown that the one he adopted was such as to indicate that there was no fair exercise of reasonable judgment in concluding to adopt it. By determining to port and throw the head of the steamer to starboard, Mr. Bence took a course which would certainly, if the approaching vessel continued to display only her red light, very soon bring the vessels on parallel courses, with their red lights exposed to each other. That was safety. To take that course was prudent, and, at the distance apart the two vessels were,

it would have been successful, if the ship had continued to expose only her red light. The steamer's duty of avoiding the ship did not cease because the ship shut in her green light and exposed her red light. It continued in the altered circumstances. As the exigency was sudden and unforeseen, and as the vessels were nearing each other rapidly, promptness of decision and action on the part of the steamer was necessary. Even if the ship had continued to expose only her red light, the steamer might, it may be conceded, have passed her in safety by going on at the same speed as before, without starboarding or with starboarding. But I think it quite clear that if the ship had continued to expose only her red light, the steamer would, having ported, have equally avoided a collision with the ship, especially as, on the weight of the evidence, the steamer's engines were slowed at the time her helm was ported. The steamer adopted this manœuvre of porting and slowing deliberately and wisely. There was no apparent necessity at that time that she should stop and reverse her engines. She discharged her duty of avoiding the ship by proper movements, for the second time. She did this, although the ship was in fault in her movements, in the presence of what she could and should have seen was a steamer. These movements of the steamer had been made, and she was swinging to starboard, under her port helm, when the ship shut in her red light, and exposed only her green light. Seeing this confusion of purpose in the ship, the engines of the steamer were stopped and reversed at full speed. This was proper. There was nothing else for the steamer to do. The ship had twice turned from a course and position in reference to which the steamer had acted, and acted in a way which would have given safety to the ship. Whatever followed the ship had brought upon herself. For what ensued after the ship exhibited her green light the second time the steamer was not responsible. Before the collision the ship made another change, and shut in her green light, and showed only her red light.

A strenuous effort was made on the part of the libellants to induce the belief that the changes by the ship from green to red and from red back to green were produced by the yawing of the ship in the following sea and with the free wind. But it is impossible to believe this, for the green light was visible at first, alone, for four minutes continuously, with no glimpse of the red light, and the green light opened from two points on the starboard bow of the steamer to three and a half points on the same bow before the red light appeared. The effects of yawing would have been sooner observed.

It is earnestly contended, for the libellants, that the red light of the ship, because of which the steamer ported, was in sight for only one minute, and that when the green light of the ship again appeared, the steamer should have kept going ahead, and should have starboarded. The ship was a third time, and in a third position, imposing on the steamer the duty of avoiding her, after the steamer had twice assumed and discharged that duty. The distance between the vessels was diminishing fast, and with this erratic vessel nearly ahead and the danger of collision apparent and imminent, it was the highest duty of the steamer to stop and reverse her engines. She did so, and her engines were reversed at full speed, and, on the evidence, she had got stern way on at the time of the collision.

If it were to be conceded that the stopping and reversing was an error of judgment, it could not be held to have been a fault, occurring as it did, after what had previously happened, but would be regarded as an error which the libellants could not make a ground of complaint. But it is not to be admitted that it was an error of judgment.

Although the court is asked to condemn the movements of the steamer, no testimony of any expert in seamanship or in navigation is adduced to show that such movements were faulty, or unwise, or imprudent, or unintelligent. The case of the libellants seems to rest on the proposition that it was the duty of the steamer to keep out of the way of the ship, and that it is not established that the ship changed her course. But the steamer could act only in view of what she saw, and what she had a right reasonably to infer from what she saw. Her movements were taken with a reasonable certainty that they would give safety to both vessels. She exercised the highest degree of diligence imposed by the law, in her efforts to avoid the ship. She exercised that diligence discreetly throughout to the end, in all the emergencies which the vacillating movements of the ship threw upon her.

The libel is dismissed with costs.

SUPREME COURT OF OHIO.

(To appear in 29 Ohio St.)

CRIMINAL LAW. — MANSLAUGHTER. — INTENT. — SELF-DEFENCE. — PRACTICE. — JURY.

ERWIN v. THE STATE.

1. Where an application is made for a discharge, under section 162 of the Criminal Code (66 Ohio L. 311), at any term of the court, on the ground that the defendant, who had given bail for his appearance, was not brought to trial before the end of the third term after the indictment was found, such application should be refused, if at such term the state is ready for trial, although the cause cannot be tried for want of time at such term.
2. Where, on the trial of a criminal cause, a juror is challenged by the defendant for cause, and the challenge is improperly refused; but such juror is afterward excused on a peremptory challenge, the judgment will not be reversed for such error, if an acceptable jury be empanelled before the defendant has exhausted his right to peremptory challenges. *Mimms v. The State*, 16 Ohio St. 221.
3. Intention or purpose to kill may be present in the crime of manslaughter, where the killing is without malice upon a sudden quarrel.
4. Where death is caused by the use of a deadly weapon, and the circumstances of the killing are detailed to the jury, some of which tend to disprove a malicious or intentional killing, it is misleading to charge the jury "that in *this* case the law raises a presumption of malice in the defendant, and an intent on his part to kill the deceased."
5. Where a person in the lawful pursuit of his business, and without blame, is violently assaulted by one who manifestly and maliciously intends and endeavors to kill him, the person so assaulted, without retreating, although it be in his power to do so without increasing his danger, may kill his assailant if necessary to save his own life or prevent enormous bodily harm.

ERROR to the court of common pleas of Gallia County.

Several assignments for error set out in the record are not specially mentioned in the opinion of the court.

The case is sufficiently stated in the opinion of the court.

S. A. Nash, for the plaintiff in error. 1. The challenge for cause should have been sustained. *Frazie v. The State*, 23 Ohio State, 551.

2. The court erred in its charge as to the presumption of intent. *Fonts v. The State*, 8 Ohio St. 98; *Robbins v. The State*, Ib. 181; *Kain v. The State*, Ib. 806; *Hagan v. The State*, 10 Ib. 459; *Shaeffner v. The State*, Ib. 598; *Rufer v. The State*, 25 Ib. 464; 1 Archb. 87, 118, 215; 1 Wharton, 292, 681; Wright, 499; Foster's C. L. 255; *Commonwealth v. York*, 9 Met. 116; *Same v. Webster*, 5 Cush. 305; 1 Gray, 61; *State v. Patterson*, 45 Vt. 308; 42 N. Y. 165; 5 Iowa, 438; *State v. Murphy*, 33 Iowa, 270; *State v. Porter*, 34 Ib. 131; 10 Mich. 212; *Patten v. The People*, 18 Mich. 314; *Head v. The State*, 44 Miss. 781.

The construction given to our statute of murder in the first and second degrees, in making the intent in giving the mortal wound an essential ingredient of the charge, demands of the state undoubted proof of that intent before calling upon the defendant to meet the case made against him.

3. On the subject of "retreating." 2 Bishop, secs. 624, 632, 633; *Stoffer v. The State*, 15 Ohio St. 47; Foster's C. L. Cases, 274; 1 East, 271; *Oliver v. The State*, 17 Ala. 587; *State v. Harris*, 1 Jones (N. C.), 190; 9 Iowa, 188; 20 Ib. 569; 8 Mich. 150; 7 Humph. 429; *People v. Sullivan*, 3 Selden, 396; *State v. Baker*, 1 Jones (N. C.), 276; *The State v. Kennedy*, 7 Nevada, 374; 8 Bush, 481; 2 Duval, 328; *Marts v. The State*, 26 Ohio St. 162; 25 Texas, 174; 24 Ind. 151; *Shorter v. The People*, 2 Comst. 193; *Campbell v. The People*, 16 Ill. 17; 23 Ib. 17; 24 Ib. 241; 14 B. Mon. 615; 18 Ib. 49; *State v. Sloan*, 47 Mo. 604; 3 Minn. 270; 17 Ala. 587; 32 Conn. 75.

Simeon Nash, also for plaintiff in error, filed a brief urging substantially the same points as those made by *S. A. Nash*.

John Little, attorney general, for the state. 1. Indictment is good. *Loeffler v. The State*, 10 Ohio St. 598.

2. The defendant was not prejudiced by the refusal of the court to sustain the defendant's challenge for cause, for the reason that the peremptory challenges were not exhausted. Code of Criminal Procedure, sec. 90.

3. The doctrine stated by the court below, in its charge as to presumptions of malice and intent to kill, is law in Ohio. *Silvers v. The State*, 22 Ohio St. 99; Wright, 20.

4. As to the doctrine that the burden of proof is upon the defendant to show justification in self-defence, &c., the homicide being established, see *Silvers v. The State*, 22 Ohio St. 99; 24 Ohio St. 584.

5. The doctrine of "retreating to the wall" is undecided in Ohio. The law, it seems to me, should be decided to be that which would best protect human life.

MOLLVAINE, J. The plaintiff in error was indicted for the crime of murder in the first degree at the February term, 1872, of the court of common pleas of Gallia County. At the succeeding term, in May of the

same year, a trial was had which resulted in a verdict of guilty of murder in the second degree. This verdict was set aside by the court, and the defendant was admitted to bail. At the March term, 1876, he was again put upon trial, convicted, and sentenced for murder in the second degree.

At the several terms of the court intervening between May, 1872, and the October term, 1875, the cause was continued without objection on the part of the defendant, who, from time to time, gave bail for his appearance as required by the court.

At the last named term, to wit, on the 13th day of September, 1875, the defendant moved the court for his discharge under section 162 of the Criminal Code (66 Ohio L. 311), which provides as follows: "If any person indicted for any offence, who has given bail for his appearance, shall not be brought to trial before the end of the third term of the court in which the cause is pending, held after such indictment is found, he shall be entitled to be discharged, so far as relates to such offence, unless the delay happen on his application, or be occasioned by the want of time to try such cause at such third term." Two days thereafter, to wit, on the 15th of the month, the same being the last day of the term, and the state being then ready to proceed to trial, this motion was overruled by the court and the cause continued, for the reason that there was no time to try the cause at that term.

When the above section is considered with section 163, following, it is clear that a defendant cannot be discharged for the reason stated, except upon an application to the court during a term thereof; and when an application is made at a term when the state is ready to proceed to trial, but the cause cannot be tried at such term for want of time, the discharge should not be ordered. See *Ex parte McGhehan*, 22 Ohio St. 442.

2. Upon the last trial, several persons named in the special venire for thirty-six jurors were examined under oath as to their qualifications as jurors, who stated severally that they had formed and expressed an opinion as to the guilt or innocence of the defendant from reading a report of the testimony of witnesses offered on the former trial of the case. Thereupon the defendant challenged such jurors for cause. But it appearing from further examination of such jurors that they felt themselves able, notwithstanding such opinion, to render an impartial verdict upon the law and evidence, the court refused the challenges for cause. These challenges should have been sustained. Such jurors are not rendered competent by section 134 of the Criminal Code, as amended February 10, 1872. 69 Ohio L. 11; *Frazie v. The State*, 23 Ohio St. 551.

It appears from the record, however, that each of these objectionable jurors was afterward excused on a peremptory challenge, and that a full panel of impartial and acceptable jurors was obtained from the persons named in the special venire, before the defendant had exhausted his right of peremptory challenge, so that, in fact, no prejudice resulted to defendant from such erroneous ruling of the court. See *Mimms v. The State*, 16 Ohio St. 221.

3. The alleged death was caused by a shot from a pistol, and the testimony tended to show that the homicide was committed by defendant upon a sudden quarrel, and in defence of his person and his property.

The charge in the indictment included murder in the second degree and manslaughter. The court properly defined these crimes to the jury substantially in the words of the statute, namely: "That if any person shall purposely and maliciously, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree;" and, "That if any person shall unlawfully kill another without malice, either upon a sudden quarrel or unintentionally, while the slayer is in the commission of some unlawful act, every such person shall be deemed guilty of manslaughter." Whereupon the court said to the jury, "You will see that the difference between manslaughter and murder in the second degree is the absence of malice *and* purpose to kill." And thereupon the court proceeded to charge as follows: "If you find from the evidence that the defendant used a deadly weapon *in this case*, and that death ensued from the use of such deadly weapon, then the law raises the presumption of malice *in the defendant*, and also an intent *on his part* to kill the decedent."

We can well see how the jury, under these instructions, may have been led to convict the defendant of murder in the second degree, though guilty of manslaughter only, or even though not guilty of any crime whatever. It was plainly inferable, from the first instruction above stated, that the defendant's crime was not manslaughter, if the killing were intentional. Such is not the law of manslaughter. If the killing be unlawful, but without malice, as upon a sudden quarrel, although intentional, the crime is nevertheless manslaughter only. It is true that the jury must have found the presence of malice as well as purpose to kill; but having first found the purpose to kill, as we may suppose, they entered on the inquiry as to malice under the influence of an instruction, that the defendant was guilty of murder or not guilty of any crime whatever: thus exposing the defendant to a moral influence against him, which should not have had lodgment in the minds of the jurors.

But the latter instruction, though not so clearly erroneous, was more palpably prejudicial to the defendant as misleading to the jury. As an abstract proposition, where the circumstances of a homicide are not known, further than the mere fact that the death was caused by the use of a deadly weapon, we do not deny that the jury may, from such fact alone, infer both malice and a purpose to kill. But where the attending circumstances are shown in detail, some of which tend to disprove the presence of malice or purpose to kill, it is misleading and erroneous to charge a jury that, in such a case, the law raises a presumption of malice and intent to kill from the isolated fact that death was caused by the use of a deadly weapon. In such case the presence of malice or intent to kill must be determined from all the circumstances proven, including, of course, the character of the weapon. It may indeed be said, with much reason, that the use of a deadly weapon in the taking of life raises the same presumptions whether other attending circumstances be shown or not; and that when other facts and circumstances are shown, they either strengthen or rebut the presumptions so arising from the character of the weapon.

The question before us, however, is not one of mere logic; but rather, how would jurors of ordinary understandings interpret and reason upon such a charge? The instruction was, "If you find from the evidence

that the *defendant* used a deadly weapon *in this case*, and that death ensued from the use of such deadly weapon, then *the law* raises the presumption of malice *in the defendant*, and also an intent *on his part* to kill the decedent." This was not an abstract proposition. It covered the case before the jury. And in our opinion, a jury of ordinary intelligence might well understand that the law fixed the guilt of the defendant as a murderer, if the evidence showed that he took the life of the deceased by the use of a deadly weapon, without regard to other circumstances; save only, as they were told in another part of the charge, that he might, under certain circumstances, justify on the ground of self-defence. But our objection to the charge is independent of all questions of self-defence, and relates to it solely as bearing on the case which the state was bound to prove in order to entitle it to a conviction.

4. It is also claimed that the court below erred in charging the jury as to the law of self-defence.

The case shows that the defendant and the deceased, his son-in-law, resided upon lands belonging to the defendant, in different houses, situated a short distance apart. Between their houses, but not within the curtilage of either, there was a corn-crib and shed suitable for the storage of grain and farming implements. This building was situate in a field cultivated by the deceased as a cropper, and had been used by him for the storage of grain, and also by the defendant for the storage of his farming tools. A controversy arose between the parties as to the right of possession of the building. Shortly before the homicide, the defendant's tools had been thrown out of this shed, and were replaced and secured by chains and locks. These chains were afterward broken. On the day of the homicide, the defendant was in the shed securing his tools, and the deceased was near his own house, and close by, when angry words passed between them; whereupon the deceased, with an axe on his shoulder, approached the shed in a threatening manner, and when near it, the defendant warned him not to enter. Without heeding this warning, the deceased advanced to the edge of the shed, perhaps within striking distance of the defendant, when the latter shot him with a pistol, inflicting a wound from which death soon followed. Testimony was offered on the trial, more or less conflicting, as to previous bitter feelings between the parties, also as to the threatening attitude of the deceased at the time of the shooting, and as to the defendant's facilities for retreat from the place occupied by him at the time.

The portion of the charge complained of was as follows: "If you find, from the greater weight of the evidence, that the defendant was, at the time the fatal shot was fired, in the lawful pursuit of his business, and he was attacked by the deceased under circumstances which denote an intention to take away his life, or to do him some great bodily harm, he may lawfully kill his assailant; provided he use all means *in his power* otherwise to save his own life or to prevent the intended harm; such as retreating as far as he can, or disabling his adversary, without killing him, *if it be in his power*. But if the attack upon him is so sudden, fierce, and violent, that a retreat would not diminish, but increase, his danger, he may kill his adversary without retreating; and further, if you find, from the evidence, that from the character of the attack there was reasonable

ground for the defendant to believe, and from the evidence you find the defendant did honestly believe, that his life was about to be taken, or he was to suffer great bodily harm, and that he believed honestly that he would be in equal danger by retreating, then, if he took the life of the assailant, he would be excused."

The contention, on the part of the plaintiff in error, is that the court below erred in the application of the doctrine of "retreating to the wall." The question here presented has not been decided in any of our reported cases, although it has been often raised and variously determined in our *nisi prius* courts. It may be said, indeed, that learned courts and able text-writers have left the question in some obscurity. The true solution must, undoubtedly, be determined upon the principles of the common law; and such is the present state of the authorities, that it seems necessary to examine the books of the law written at a period before the apparent or real confusion had an existence.

When the common law had become a system as nearly perfect as human reason could make it, homicide *se defendendo* was either justifiable or only excusable. This distinction was clearly recognized. In speaking of manslaughter, Lord Coke (3 Institute, 55) says: "Some be voluntary, yet being done upon inevitable cause, are no felony: as if A. be assaulted by B., and they fight together, and before any mortal blow be given, A. giveth back until he cometh to a hedge, wall, or other strait, beyond which he can not passe, and then, in his own defence and for safeguard of his own life, killeth the other; this is voluntary, and yet no felony; and the jury that finde that it was done *se defendendo* ought to finde the special matter. And yet such a precious regard the law hath of the life of man, though the cause be inevitable, that, at the common law, he should have suffered death; and, though the statute of Gloucester save his life, yet he shall forfeit all his goods and chattels. . . . If A. assault B. so fiercely and violently and in such manner as if B. should give back, he should be in danger of his life, he may, in this case, defende himselfe; and if, in that defence, he killeth A., it is *se defendendo*." And on page 56, speaking of the same subject, he says: "Some, without giving back to a wall, &c., or other inevitable cause, as if a thief offer to rob or murder B. either abroad or in his house, and thereupon assault him, and B. defende himselfe without giving back, and in his defence killeth the thiefe, this is no felony; for a man shall never give way to a thiefe, &c., neither shall he forfeit anything."

Sir Mathew Hale, speaking of homicide *ex necessitate* (1 Hale's Pleas of the Crown, chap. 40), says that homicide in defence of a man's own life, which is usually styled *se defendendo*, is of two kinds: "1. Such as though it excuseth from death, yet it excuseth not the forfeiture of goods, nor is the party to be absolutely discharged from prison, but bailed, and to purchase his pardon of course. 2. Such as wholly acquits from all kinds of forfeiture." He defines homicide *se defendendo* to be "the killing of another person in the necessary defence of himself against him that assaults him;" and states the rule as follows: "3. Regularly it is necessary that the person that kills another in his own defence fly as far as he may to avoid the violence of the assault before he turn upon his assailant; for in cases of hostility between two nations, it is a reproach

and piece of cowardice to fly from an enemy; yet in cases of assaults and affrays between subjects under the same law, the law owns not any such point of honor, because the king and his laws are to be the *vindices injuriarum*, and private persons are not trusted to take capital revenge one of another. But this hath some exceptions: —

“1. In respect of the person killing. . . . 2. In respect to the person killed. If a thief assaults a true man either abroad or in his house to rob or kill him, the true man is not bound to give back, but may kill the assailant, and it is not felony.”

About a century later (1762), Mr. Justice Foster, in his admirable discourse on the law of homicide founded in necessity (Foster's Crown Cases, chap. 3, p. 273 *et seq.*), says: “Self-defence naturally falleth under the head of homicide founded in necessity, and may be considered in two different views. It is either that sort of homicide, *se et sua defendendo*, which is perfectly innocent and justifiable, or that which is in some measure blamable and barely excusable. The want of attending to this distinction hath, I believe, thrown some darkness and confusion upon this part of the law. The writers on the crown law, who, I think, have not treated the subject of self-defence with due precision, do not, in terms, make the distinction I am aiming at; yet all agree that there are cases in which the man may, without retreating, oppose force to force, even to the death. This I call justifiable self-defence. They, justifiable homicide. They likewise agree that there are cases in which the defendant cannot avail himself of the plea of self-defence without showing that he retreated as far as he could with safety, and then, merely for the preservation of his own life, killed the assailant. This I call self-defence, culpable, but, through the benignity of the law, excusable. In the case of justifiable self-defence, the injured party may repel force with force in defence of his person, habitation, or property, against one who manifestly intendeth and endeavoreth, with violence or surprise, to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he findeth himself out of danger, and if, in a conflict between them, he happeneth to kill, such killing is justifiable.”

In 1803, Mr. East published his excellent Treatise of the Pleas of the Crown, and, on page 271, says, in speaking of homicide from necessity: “Herein may be considered, 1. What sort of attack it is *lawful and justifiable* to resist, even by the death of the assailant, and where the party is *without blame*. 2. Where such killing is only excusable, or even culpable, and the party is not free from blame,” &c.

In relation to the first sort, the author says: “1. A man may repel force by force, in defence of his person, habitation, or property, against one who manifestly intends and endeavors, *by violence or surprise*, to commit a *known felony*, such as murder, rape, robbery, arson, burglary, and the like, upon either. In these cases he is not obliged to *retreat*, but may pursue his adversary until he has secured himself from all danger; and if he kill him in so doing it is called justifiable self-defence; as, on the other hand, the killing by such felon of any person so lawfully defending himself will be murder. But a bare fear of any of these offences, however well grounded, — as that another lies in wait to take away the party's life, unaccompanied with any overt act indicative of such an in-

tention,— will not warrant in killing that other by way of prevention. There must be an actual danger at the time.”

In this connection, it is hardly necessary to add, much less to cite, authority to show that a homicide, which cannot be *justified* under the foregoing rules, cannot be *excused* unless the slayer shows that before the mortal blow was given he had retreated as far as he safely could; and that he killed his adversary solely from the necessity which then existed, in order to save himself from immediate death or enormous bodily harm.

Shortly after the publication of Mr. East's treatise, the case of the *Commonwealth v. Selfridge*, a leading case in the United States, was tried in the supreme judicial court of Massachusetts, in the year 1806. The charge by the court below, as above cited, was a substantial transcript of the propositions announced by Justice Parker in his charge to the jury in *Selfridge's case*, Selfridge's Trial, 160. In order to fully understand and apply the doctrine of Selfridge's case, it must be observed that Justice Parker assumed in his charge to the jury that Selfridge was not free from blame in provoking the assault from young Austin, for whose death he was upon trial. The deceased had taken upon himself the quarrel of his father, whom the defendant had but recently posted. I quote from the charge: “Who was originally in the wrong it is not for me to say; but I feel constrained to say, that whatever provocation the defendant may have conceived to have been given him, and however great the injury the deceased's father may have done him, he certainly proceeded a step too far in making the publication which came out in the morning of this unhappy disaster. To call a man a coward, liar, and scoundrel in the public newspapers, and to call upon other printers to publish the same, is not justifiable under any circumstances whatever. Such publication is libellous in its very nature, as it necessarily excites to revenge and ill blood.” It also appears in the case that Selfridge anticipated an assault from some one on account of the publication, and had armed himself with a pistol, with which he shot the deceased immediately upon being assaulted with a cane. Such being the case, we do not understand that the right to defend, even unto death, without retreating, against a felonious assault, where the assaulted party was without fault, was intended to be denied by the learned judge. Indeed, in the charge we find the following: “Numerous authorities, ancient and modern, have been read to you upon this subject.” (*Homicide se defendendo*, both justifiable and excusable.) “Were it necessary for you to take those books with you, and compare the different principles and cases which have been cited, your minds might meet with some embarrassment, there being in some instances an apparent, though in none a real incongruity.” If anything further was needed to show that Justice Parker in his charge intended to limit the duty of “retreating” to cases of excusable killing in self-defence, and did not intend to extend the duty to cases of justifiable killing, it might be implied from the fact that in the previous month he was present with all the judges when Chief Justice Parsons charged the grand jury who indicted Selfridge as follows: “A man may repel force by force in defence of his person against any one who manifestly intends, or endeavors by violence or surprise, feloniously to kill him. And he is not obliged to *retreat*, but may pursue his adversary until he has secured himself from all danger;

and if he kill him in so doing, it is *justifiable self-defence*. But a bare fear, however well grounded, unaccompanied by any overt act indicative of such intention, will not warrant him in killing. There must be an actual danger at the time. And (in the language of Chief Justice Hale) it must plainly appear by the circumstances of the case, as the manner of the assault, the weapon, &c., that his life was in imminent danger, otherwise the killing of the assailant will not be *justifiable homicide*. But if the party killing had reasonable grounds for believing that the person slain had a felonious design against him, although it should afterward appear that there was no such design, it will not be murder, but will be either manslaughter or *excusable homicide*, according to the degree of caution and the probable grounds for such belief. These principles have been recognized by the wisest and most humane writers on criminal law."

By observing the distinction between justifiable and excusable homicide *se defendendo*, as stated in the authorities above quoted, much of the discrepancy in the decisions of the courts where the common law prevails is made to disappear, — most of the cases upon the facts being such as would only *excuse* the killing.

It is true, under our Constitution, whether the killing in self-defence be justifiable or excusable, there must be an entire acquittal, for the reason that there is no forfeiture of goods in cases of excusable homicide. But this is no reason why the difference between the cases as to the duty of retreating to the wall should be ignored. The taking away of the forfeiture in cases of excusable homicide did not relieve the party in such case from the duty of retreating, nor did it impose such duty in cases where it was not before required.

It is true that all authorities agree that the taking of life in defence of one's person cannot be either justified or excused, except on the ground of *necessity*; and that such necessity must be imminent at the time; and they also agree that no man can avail himself of such necessity if he brings it upon himself. The question, then, is simply this: Does the law hold a man who is violently and feloniously assaulted responsible for having brought such necessity upon himself, on the sole ground that he failed to fly from his assailant when he might have safely done so? The law, out of tenderness for human life and the frailties of human nature, will not permit the taking of it to repel a mere trespass, or even to save life, where the assault is provoked; but a true man, who is without fault, is not obliged to fly from an assailant, who, by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm.

Now, under the charge below, notwithstanding the defendant may have been without fault, and so assaulted, with the necessity of taking life to save his own upon him, still, the jury could not have acquitted, if they found he had failed to do all in his power otherwise to save his own life, or prevent the intended harm, as retreating as far as he could, &c. In this, we think, the law was not correctly stated.

The suggestion, by the attorney general, that that rule should be declared the law which is best calculated to protect and preserve human life, is of great weight, and we can safely say that the rule announced is, at least, the surest to prevent the occurrence of occasions for taking life; and this, by letting the would-be robber, murderer, ravisher, and such like,

know that their lives are, in a measure, in the hands of their intended victims.

Of course, there is nothing in this opinion which will be understood as withdrawing from the jury the determination of every question of fact involved in an issue of *se defendendo*. Whether, under the law as here laid down, and such other rules as may be applicable to any particular case, a necessity existed, at the time, to take life in order to save life or prevent enormous bodily harm, as well as the question, whether the killing, under the circumstances of each case, was prompted solely by such necessity, or by other motives, is to be determined by the jury in each case.

Judgment reversed, and cause remanded for further proceedings.

SUPREME COURT OF MICHIGAN.

[JUNE TERM, 1877.]

EFFECT OF THE STATUTE OF LIMITATIONS ON DEMAND PAPER.

PALMER v. PALMER.

Paper that is payable on demand is due at date. The collection of paper that is payable on demand, or at a fixed time, is barred by the statute of limitations, at the expiration of the statutory period from the date at which it became payable, whether demand has been made or not.

MR. JUSTICE CAMPBELL delivered the opinion of the court.

The only question in this case is whether a certain promissory note, not negotiable, given by defendant to plaintiff, was barred by the statute of limitations when suit was begun.

The note was in the following terms:—

“\$1,500. Atlas, Mich., October 16, 1867.

“Thirty days after demand I promise to pay Jonathan Palmer fifteen hundred dollars, value received, without defalcation.

“FRANK J. PALMER.”

No demand is found to have been made until May 22, 1874, or six years and seven months after date. An attempt was made to show a previous demand by showing the transmission by mail of a letter from the cashier of a bank to whom the paper had been sent in July, 1873. This notice is not found to have reached defendant, and it contained nothing to indicate the identity or ownership of the note. The court below found against it.

Although some evidence is set forth in the finding, which seems to have been inserted at the request of counsel, and which may possibly have had some bearing upon the consideration of the note, yet no finding is based upon it. The only pertinent facts found at all are the making and non-payment of the note, and the demand made in 1874.

The court found that the suit was not barred. This conclusion was based on the theory that until demand made no action accrued; and that as the time limited by the statute runs from the time when action accrues, it did not begin to run until thirty days after May 22, 1874, from which date interest was allowed.

Taking this note as it reads and as it is established by the finding, being payable without interest, it is impossible to assume that it was intended to run for any considerable time. The fair inference is that it was given for some debt or other consideration on which an immediate liability existed which the maker of the note expected to be ready to meet on reasonable notice, which was fixed at thirty days. If the note had been negotiable and indorsed over, any long delay to present it would unquestionably have released the indorser.

If the judgment is correct, it can only be so because by the terms of the contract the holder had a right to postpone the maturity of the debt as long as he chose to do so. For if the debt did not become payable until fixed by demand, and the demand was optional with the creditor, no tender could be made which would bind him, and he could keep the debt alive in spite of the debtor for an indefinite period. If there was any infirmity in the consideration, or any defect in the binding character of the obligation, he might retain it until all testimony was lost, and defeat the defence. This is the mischief which the statutes of limitation were intended to remedy. If this case is not within them it is not because it ought not to be covered by them.

It is now well settled that a note payable on demand is payable at once and without demand, so that the statute runs from its delivery. And this rule has been applied where from the form of the contract it is manifest that immediate payment was not expected. Thus in *Norton v. Ellamy*, 2 M. & W. 461, the note called for interest which indicated at least an expectation of some delay. In *Howland v. Edmunds*, 24 N. Y. 307, the premium capital notes of a mutual insurance company payable "in such portions and at such time or times as the directors of said company may, agreeably to their act of incorporation, require," were held to stand on the same footing with ordinary demand notes, so that the statute began to run from date. In *Waters v. Thanet*, 2 A. & E. N. S. 757, a party had promised to pay the amount of certain dishonored bills "whenever my circumstances may enable me to do so, and I may be called upon for that purpose." This promise was made in 1833. An action was begun in 1838, less than six years after demand and within a year after the plaintiff had learned of defendant's having become solvent through inheritances. It appeared, however, that he had actually become able to pay in 1825, and the court held the statute ran from such ability, without demand. A similar decision was made in *Jones v. Kisler*, 3 Kansas, 184, where the note was payable when the maker received a payment from government, or as soon as otherwise convenient. The statute was held to run after a reasonable time, which there was held on the facts to have been not later than sixty days. In *Emery v. Day*, 1 C., M. & R. 245, a contract was made for work payable out of a public fund to be provided, but it was held the statute began to run from the time the work was completed, although the fund was not raised until some time thereafter.

If this question depends upon any reasonable principle it is impossible to find any ground for holding notes payable on demand as setting the statute running at once, which would not make the note in the present case barred in six years after the expiration of thirty days. The payee could have presented it at any time, and it is not the design of the statute to put it in the power of the creditor to postpone its application at his own pleasure.

Such notes are very rarely given. It is quite common to make bills of exchange payable at or after sight. But the drawer and indorsers are discharged by any considerable delay. It is one of the legal conditions of such paper that there shall be a speedy presentment. Why a different rule should be applied to a note is not evident.

There are not more than half a dozen cases, if so many, in which this form of note has been passed upon directly. In *Holmes v. Kerrison*, 2 Taunt. 323, it was held that a note payable after sight was not barred until six years after it had been presented for payment. And in *Thorpe v. Booth*, Ryan & Moody, 388, upon the authority of that decision, a note dated March 12, 1813, payable twenty-four months after demand, and not demanded until June 28, 1823, was held not barred. In *Holmes v. Kerrison*, the case is put without further reasoning upon the ground that no action could have been brought until after presentment, and *Thorpe v. Booth* contains no reasoning at all. While these decisions seem to have settled the practice in England, no subsequent case, so far as we have been informed, seems to have affirmed or vindicated them in any direct way, although they are probably adhered to. But so far as their principle is involved, it has been departed from to some extent, at least.

In *Webster v. Kirk*, 9 L. & Eq. 408, it was held that a payee who had been sued by a subsequent holder of a dishonored bill, could not in turn sue the drawer more than six years after the dishonor of the paper, although a much less time had elapsed since his own liability had been enforced. It was urged that the payee could not sue on a note which he did not hold, and that no action therefore accrued to him until he was damnified. But the court of queen's bench held, nevertheless, that the statute ran from the dishonor. This could only have been upon the ground that any of the parties might have taken up the paper and thus obtained a right of action.

In *Clayton v. Gosling*, 5 B. & C. 360, a note payable twelve months after notice had not been presented before the maker went into bankruptcy. The question came up whether it was provable under the commission as an existing debt due, and it was held provable. The court, however, placed the decision upon the ground that inasmuch as the note contained the words "for value received," it was an admission of an existing debt, and might be regarded as security for it. This is a far-fetched reason, which shows how far it was deemed proper to go to prevent a failure of justice.

In the United States there has been some incidental recognition of the doctrine of *Holmes v. Kerrison*. *Thrall v. Mead*, 40 Vermont, 540; *Stanton v. Estate of Stanton*, 37 Vermont, 411; and *Wolfe v. Whiteman*, 4 Harringt. 246, appear to adopt it.

In New York there are *dicta* to the same effect in *Wenman v. Mohawk*

Ins. Co. 13 Wend. 267; *Bruce v. Tylson*, 25 N. Y. 194; and *Howland v. Edmunds* before cited. No such point arose in any of these cases, and the actual decision in each of them is in our opinion difficult to harmonize with any such principle.

In *Morrison v. Mullin*, 34 Penn. St. 12, it was held that where a demand was necessary to found an action upon, the demand was barred unless made in six years, and the right of action extinguished by the delay.

We cannot but think this to be sound doctrine. Whatever may have been the ancient prejudice against statutes of limitation, they are now regarded as just and entitled to be fairly construed. If a creditor has the means at all times of making his cause of action perfect, it would be unjust and oppressive to hold that he could postpone indefinitely the time for enforcing his claim by failing to present it. He is really and in fact able at any time to bring an action, when he can by his own act fix the time of payment. It is no stretch of language to hold that a cause of action accrues for the purpose of setting the statute in motion as soon as the creditor, by his own act and in spite of the debtor, can make the demand payable. It may be otherwise, possibly, where delay is contemplated by the express terms of the contract, and where a speedy demand would manifestly violate its intent. But where no delay is contemplated the rule is just and reasonable; and the presentment should be reasonably brought or the creditor should be subjected to the operation of the statute.

The judgment must be reversed, and judgment entered for the defendant on the finding with costs of both courts.

SUPREME COURT OF APPEALS OF VIRGINIA.

[1877.]

INSURANCE.—SEPARATE SUMS.—FRAUD AS TO SINGLE SUBJECT OF INSURANCE.

MOORE v. VIRGINIA FIRE AND MARINE INS. CO.

The policy insured separate sums on building, fixtures, and stock, and provided that fraud on the part of the insured should cause a forfeiture of all claim under the policy.

Held, that a fraud proved in the claim in respect of one of the subjects of insurance avoided the policy as to all, and that the policy would be avoided by fraud on the part of the insured in making the contract, without any express provision to that effect.

PER CURIAM. This is a writ of error to a judgment rendered on the 3d of February, 1873, by the circuit court of the city of Richmond, in an action of assumpsit brought in said court by David W. Moore against the Virginia Fire and Marine Insurance Company of Richmond, on a

policy of insurance. Issue was joined on the plea of non-assumpsit, and leave was given to introduce any evidence under that plea that could be introduced under any special plea. The jury found a verdict for the defendant on the issue joined, and thereupon the plaintiff moved the court to set aside the verdict and grant a new trial, which motion was overruled, and judgment was rendered for the defendant. The plaintiff excepted to an opinion of the court given against him on the trial of the cause. It is stated in the bill of exceptions that on the trial of the cause the plaintiff, to sustain the issue on his part, offered the policy of insurance, which is set out in *hæc verba* in the bill: "By this policy of insurance," it proceeds to state, "The Virginia Fire and Marine Insurance Company of Richmond, in consideration of the receipt of \$125, do insure David W. Moore and his legal representatives \$5,000, to wit: \$2,000 on his new wooden flour and corn-mill building, moved by water power, and wooden and gravelled lumber-house connected and communicating, situate near the mouth of Shockoe Creek, Richmond, Virginia, and adjoined by his wooden plaster-mill; \$1,000 on machinery and fixtures of all kinds, including water-wheel and mill-stones in said mill building; and \$2,000 on his stock of grain, flour, meal, offal and empty barrels and bags in said mill building and lumber-house, the same being on leased ground; other insurance on mill, \$2,000; machinery, \$2,000; stock, \$1,000 — against all such immediate loss or damage as may occur by fire to the property specified, not exceeding the sum insured, nor the interest of the assured in the property, except as hereinafter provided, during one year, to wit, from the 26th day of August, 1870, at 12 o'clock noon, to the 26th day of August, 1871, at 12 o'clock noon; to be paid in 60 days after the proof required by this company shall have been received at the office of the company in Richmond, and the loss shall have been satisfactorily ascertained and proved, as required by the provisions of the policy."

Then follow various other provisions of the policy, which it is unnecessary here to repeat, until we get to that which direct what is to be done in the matter in case of loss, which is in these words: "In case of loss the assured shall give immediate notice thereof, and shall render to the company a particular account in writing of said loss, under oath, stating the time, origin, and circumstances of the fire, the occupancy of the building insured, or containing the property insured, other insurance if any, and copies of all policies; the whole value and ownership of the property, and the amount of loss or damage, and shall also declare truly on oath that the fire and consequent loss and damage was occasioned without fraud or evil practice on his part; and that he has not done, or caused to be done, any act in violation of the provisions of this policy, whereby it would become void, and shall produce the certificate under seal of a magistrate, notary public, or commissioner of deeds, nearest the place of the fire and not concerned in the loss, or related to the assured, stating that he had examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has without fraud sustained loss on the property insured to such an amount as the said official shall certify. In no case shall the company be liable, or the claim be for a greater sum than the actual damage to, or cash value of the property at the time of the fire, or beyond such sum as

will enable the assured to replace or restore the property lost or damaged. A suitable allowance will be required in settlement of any loss for depreciation from use or otherwise," &c. "If required, the assured shall produce books of accounts, and other proper vouchers, and all property saved and hereby insured, whether damaged or not damaged, and be examined under oath by any person appointed by the company touching all persons relating to the loss; or, if deemed necessary by the company, shall produce said vouchers and property and submit to a second examination, and subscribe such examination when reduced to writing," &c. "And until such proofs and certificates are produced, and examination and appraisal permitted, the loss shall not be deemed proved or payable. All fraud or attempt at fraud or false swearing on the part of the assured, or on the part of any person in his behalf, shall cause a forfeiture of all claim under this policy." Then follow various other provisions not necessary to be here repeated until we get down to the concluding one, in these words: "And this policy is made and accepted on the above express conditions." And the renewal thereof, which is in the words and figures following, to wit: —

"Renewal premium, \$125. Virginia Fire and Marine Insurance Company. Office company's building, No. 1015 Main Street, Richmond, August 26, 1871. Received from David W. Moore \$125, being the premium on \$5,000 insured under the policy No. 19,526, which is hereby continued in force for one year, to wit, from the 26th day of August, 1871, until the 26th day of August, 1872, at noon. William Willis, Jr., secretary. W. L. Cowardin, president. No. 34,812." And proved the loss and destruction of the wooden flour and corn-mill building, and the machinery and fixtures and stock of grain, &c., named in said policy, on the night of the 24th of December, 1871, by fire; also proved the value of said building to be \$2,791.89, at the time of the fire, and the value of machinery and fixtures to be \$5,250 at the time of the fire; and also offered testimony tending to show that the value of the stock of grain, &c., at the time of the fire, was \$4,025; the plaintiff himself testifying on the trial to the truth and correctness of said valuations; also proved that he was the owner of the said property both at the time of the insurance and after its loss and destruction by fire; also proved that he had paid the premium mentioned in said policy and renewal, and also that he had given notice of his said loss to the defendant on or about the 10th day of January, 1872, rendering a particular account in writing of said loss as aforesaid under oath, as required by said policy. And thereupon the defendants, to sustain the issue on their part, proved that the claim of the plaintiff, for his alleged loss on his said stock of grain, &c., was fraudulent and false, and that the amount of loss designated in said proof sworn to by him as aforesaid, was fraudulent and false, so far as the said stock of grain, &c., was concerned; but it was not shown that the claim of the plaintiff, or his proof of loss as aforesaid, as to the said building, or said machinery and fixtures, was fraudulent and false, and thereupon the defendant asked the following instruction: —

"If the jury shall believe, from the evidence, that the plaintiff attempted and intended a fraud upon the defendant, by altering his books of accounts, or that he swore falsely and fraudulently to more or greater

loss upon his stock than he actually sustained, in the account of loss rendered by him, then the said fraud or false swearing avoided and annulled his whole policy, and he can recover nothing in this action," which the court declined to give, but gave the following instructions:—

"If the jury believe, from the evidence, that the plaintiff, either in the making of his contract of insurance with the defendant, or at any time thereafter prior to any default upon the part of the defendant in paying any loss incurred by fire upon the policy sued upon, attempted or intended a fraud, by false representations and false swearing, as to the amount and value of the property insured and destroyed, with a view to enhance his demand upon the defendant, they are instructed that such fraud destroyed all right upon his part to recover in this action. But if the jury shall believe that the plaintiff was guilty of no such fraud prior to default by the defendant, but that subsequent thereto, with a view to strengthen his case before the court, he has been guilty of attempting or intending a fraud, by altering his books of accounts, and by false swearing upon the trial of the cause, while such fraud or attempted fraud does not avoid and annul all claims upon his part under the policy, it is a material fact to be weighed by the jury in valuing the testimony and determining upon the validity of the whole claim, and the amount of the loss alleged to have been incurred.

"The plaintiff, under the policy sued upon, had no right to demand of the defendant payment for any loss sustained by destruction by fire of any of the property insured in the policy, until after the termination of sixty days from the time of presentation of due notice and proof of loss to the defendant, and until then the defendant could not be regarded as guilty of any default in compliance with their contract."

Judgment having been rendered against the plaintiff as aforesaid, he appealed to a judge of this court for a writ of error thereto; which was accordingly awarded. The plaintiff in error, in his petition for a writ of error, assigned but two errors in the judgment, both of them being in the instructions given by the court to the jury. The chief of these assignments of error in the instructions is:—

1. In ruling that fraud and false swearing as to one independent subject of insurance avoided the whole policy.

There is a provision in the policy that "all fraud or attempted fraud or false swearing on the part of the assured, or on the part of any person in his behalf, shall cause a forfeiture of all claim under this policy." On the trial of this cause the defendants, to sustain the issue on their part, proved that the claim of the plaintiff for his alleged loss on his stock of grain, &c., named in said policy, was fraudulent and false, and that the amount of loss designated in his proof of loss, sworn to by him, was fraudulent and false so far as the said stock of grain, &c., was concerned, but it was not shown that the claim of the plaintiff, or his proof of loss as aforesaid, as to the buildings, or machinery and fixtures named in said policy, was fraudulent or false.

The argument before this court of the counsel for the plaintiff proceeded upon the concession that there was such fraud and falsehood, so far as the said stock of grain, &c., was concerned,—a fact which is certified in the record as having been proved on the trial, and was, in

effect, found by the jury, and which, therefore, could not be denied by said counsel; and he admitted that by reason of such fraud and falsehood the plaintiff had forfeited all claim under the policy as to the said stock of grain, &c.; but he contended, that as it was not shown that the claim of the plaintiff, or his proof of loss as aforesaid, as to the said buildings or said machinery and fixtures, was fraudulent or false, the plaintiff had not forfeited his claim under the policy as to the said buildings or said machinery and fixtures. The said counsel also admitted that it was perfectly competent for the parties to agree that "all fraud or attempt at fraud or false swearing on the part of the assured, or on the part of any person in his behalf, shall cause a forfeiture of all claim under the policy," not only as to the particular subject named in the policy to which the said fraud or false swearing relates, but also as to all other subjects therein named.

The question to be now considered and decided therefore is one of construction merely; that is, whether, according to the true construction of the provision aforesaid, it was intended that for a fraud or attempt at fraud or false swearing on the part of the assured, in relation to one only of several subjects embraced in one policy of insurance, as is this case, there should be a forfeiture of all claim under the policy, not only in regard to the particular subject aforesaid, but also in regard to all other subjects embraced in the policy, or only a forfeiture of all claim under the policy in regard to such particular subject. The counsel for the plaintiff maintains the latter of these alternative constructions, while the counsel for the defendant maintains the former. Which of them is correct, is the question which this court has now to solve.

We are all of opinion that the former is the correct construction, and that the forfeiture is total. Supposing that to have been the true intention of the parties, we know not how it could well have been expressed in plainer language, — "All fraud; &c., shall cause forfeiture of all claim under policy." A more comprehensive word than "all" cannot be found in the English language, and it certainly has in this case the comprehensive meaning contended for by the counsel of the defendant instead of the restricted meaning contended for by the counsel for the plaintiff, unless very strong reasons can be furnished for construing it in the latter sense. So far from seeing such reasons, we think there are strong reasons for believing the real intention of the parties in making the provision aforesaid corresponded with the literal terms in which it is expressed; and that it was intended to create a general forfeiture as to all the subjects embraced in the policy, and not a forfeiture only as to the particular subject to which the fraud or false swearing might relate. A policy of insurance is a contract in the making of which peculiar and great confidence must of necessity be reposed by the insurer in the insured. Good faith and fair dealing are especially required by the former of the latter. The former must mainly depend on the oath of the latter, and the account he may render, to show the fact of the loss of the property insured, and the amount of the damage incurred by him, for which he claims indemnity under the policy. Where there is no good reason to suspect fraud or false swearing on the part of the insured in making out his preliminary proof of loss, the insurer generally requires no further evidence to sustain the

claim of the insured than his own oath and account; unless it be "the certificate under seal of a magistrate, notary public, or commissioner of deeds nearest the place of the fire, and not concerned in the loss or related to the assured, stating that he had examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has without fraud sustained loss on the property insured to such an amount as the said official shall certify." Such a certificate is generally provided for in a policy of insurance, and is provided for by the policy in this case. Now here, instead of there being no good reason to suspect fraud or false swearing on the part of the insured, in making out his preliminary proofs, it is proved that his claim for his alleged loss on one of the subjects insured was fraudulent and false; and that the amount of loss designated in his said proof of loss, sworn to by him as aforesaid, was fraudulent and false, so far as the said subject was concerned. Is it unreasonable for the policy to provide that in such a case the insured shall forfeit all claim under the policy, — not only as to the said subject, but also as to all other subjects included in the policy?

Having been proved to be guilty of fraud and falsehood in regard to one of the subjects included in the policy, it is not unreasonable to suppose that he may be guilty of the like wrongs in regard to the other subjects included therein. He may be so guilty, and the insurer may have no means of proving such guilt. He may himself have been the author of the burning of which he complains; or he may have obtained the insurance for the very purpose of obtaining money by committing fraud and perjury, in regard to one or more of the subjects insured. He was capable of either of these crimes, as he was capable of the crime which was proved upon him.

We therefore think the construction contended for by the counsel for the defendant is a reasonable one, and that it is the true one, especially as it accords with the literal terms of the provision in question.

The learned counsel for the plaintiff, in his argument in this case, referred to a great many decisions of other states and countries, for the purpose of sustaining his views of the case, and especially of the question we are now considering. He referred to no decision of this court, because there is none on the question; and he admitted that he could find no decision of any other court upon the very question in issue, which is certainly very strong negative evidence that no such decision exists. We have referred to all these decisions, or at least all of them which, from the statement of the learned counsel in regard to them, seemed to be material to be referred to by us; and none of them seem to be in conflict with the views we have expressed. If any of them be so, we do not think they expound the law correctly, and we are therefore unwilling to be guided by them.

The learned counsel argues that though the policy in this case is a contract entire in form, being a contract by which "The Virginia Fire and Marine Ins. Co. of Richmond, in consideration of the receipt of one hundred and twenty-five dollars, do insure (for one year) David W. Moore and his legal representatives five thousand dollars, to wit," &c. Yet he contends that it is a several contract in substance, because it proceeds to value severally the different parts of the subject insured as follows, to wit: —

"\$2,000 on his new wooden flour and corn-mill building, moved by water power, and wooden and gravelled lumber-house connected," &c.; "\$1,000 on machinery and fixtures of all kinds, including water-wheel and mill-stones in said mill building;" and "\$2,000 on his stock of grain, flour, meal, offal, and empty barrels and bags in said mill building and lumber-house," &c. And he argues that the provision of forfeiture in question must be construed precisely in the same way in this contract as a like provision would be construed in a several policy on each of the subjects insured. In other words, that this policy, though joint in form, is several in substance, and must be construed accordingly, as well in regard to the clause of forfeiture in question as to every other part of the policy. He applies to the case the rule of construction, *reddendo singula singulis*. That rule applies to many cases arising under policies of insurance, as some of the cases cited by the learned counsel show, but it does not apply to this case for reasons already stated; it being the manifest intention of the parties, as it is the express declaration of this contract, that "all fraud," &c., "shall cause a forfeiture of all claims under this policy." Where in reason is the difference between this case and a case in which the different parts of the same subject are included in one valuation, in regard to the clause in question? Suppose here the whole subject insured had been valued at \$5,000, without any separate valuation of the different parts of the subject, and there had been fraud as to one of the parts only; would not all claim under the policy, as well as to the other parts as to that part of the subject, have been forfeited? Certainly so, as all will admit. But where in reason is the difference between the two cases?

What has the mode of valuation of the subject, whether it be joint or several, to do with the construction of the clause of forfeiture for fraud? Is not the evil of the fraud the same in either case? Is not the presumed intention of the parties in regard thereto the same in either case? And do not the literal terms of the clause apply alike to each case?

The policy in this case is an entire contract, notwithstanding the separate valuation of the different parts of the subject insured. That separate valuation was intended for the benefit of the insurers, and not the insured. The latter would have been benefited by letting the joint valuation of the whole subject insured remain at the sum of \$5,000 fixed in the policy, instead of apportioning it among the different parts of the subject, as is afterward done in the policy. By letting the joint valuation remain at the sum of \$5,000, that would have been the only limit of the right to recover the actual value of any part of the subject insured, which might be lost by any cause insured against. Whereas, by apportioning the amount of the joint valuation among the different parts of the subject, the valuation of each part is the limit of the right to recover for any loss sustained on account of such part.

It cannot be supposed that either of the parties, much less the insurers, for whose benefit alone the separate valuation was made, could have intended that it should have the effect of taking from them the benefit of the provision of the policy, in regard to fraud or false swearing, as to every part of the subject insured, except as to that part to which fraud or false swearing might directly and specially relate. We have seen that

both reason and the literal terms of the policy confirm the view that in every such case of fraud or false swearing, the forfeiture extends to all claim under the policy, on account of the subject insured, or any part thereof.

There are cases, it is true, in which it has been held, and no doubt properly, that a policy may be avoided as to a part of a subject insured, and valid as to the rest, even though the language of the policy declaring it to be void, in such a case, may seem to be general, and apply to the whole policy; as, for instance, in a case in which the policy declares that it shall be void for any subsequent alienation by the insured. There, if only a part of the subject be aliened, and the risk as to the rest cannot be increased by such partial alienation, the policy as to the rest would not be thereby avoided, but would remain in full force in pursuance of the presumed intention of the parties. But such a construction has never been applied, and can never be applied to a case like this, of fraud and false swearing, which pervades and avoids the whole policy. To such a case the maxim *falsum in uno falsum in omnibus* applies. The insured, having been convicted of falsehood in regard to one of the subjects insured, will be considered as false in regard to all the rest. Suppose the parties had been asked, when they entered into this contract, whether they intended that the forfeiture for fraud and falsehood of the assured as to one of the subjects insured, should be confined to that subject, or extend also to all the other subjects insured in the same policy, what would have been their answer? Can anybody doubt? Certainly the insurers would have answered, "The latter," and surely the insured could not have answered otherwise; for that would have broken off the contract. The language of the policy, as already shown, literally accords with this obvious intention of the parties.

In regard to the first assignment of error, we are therefore of opinion that the circuit court did not err "in ruling that fraud and false swearing as to one independent subject of insurance avoided the whole policy." The other of the two assignments of error in the instruction is:—

2. That the court extended the penalty of forfeiture to any false representation, or false swearing, is to the amount and value of the property insured and destroyed, made either in the contract of insurance, or at any time thereafter, prior to any default on the part of the defendant in paying any loss incurred.

The cases referred to in support of this assignment of error, to wit: *Ferriss & Eaton v. North American Fire Insurance Company*, 1 Hill, 71, and *Insurance Companies v. Weides*, 14 Wall. 375, seem to decide that the fraud or false swearing referred to in such a provision as the one now in question, standing in the same connection and location in the policy as does the provision here, is such fraud or false swearing only as relates to the preliminary proofs. Without deciding, but conceding (for the purposes of this case), that to be true, there can be no doubt but that fraud on the part of the insured in making the contract of insurance would render it void without any express provision to that effect in the policy, and even though there might be such a provision therein relating only to fraud and false swearing in connection with the preliminary proofs. In delivering the opinion of the court in the case cited from 1 Hill, 71,

supra, Cowen, J., takes occasion to say expressly, that "a policy is always avoided by the common law for the least want of good faith in the assured."

We think there is no error in any of the instructions given by the court to the jury. The propositions of law therein announced are undoubtedly true, nor were any of them mere abstractions. But if it can be said that any of them were such abstractions, the court would not, on that ground, reverse the judgment, there being no error in law in the instructions, and they could not have had the effect of misleading the jury.

Judgment affirmed.

SUPREME COURT OF INDIANA.

[MAY, 1877.]

MUNICIPAL BOND. — DONATION ACT. — BARGAIN BETWEEN MUNICIPAL CORPORATION AND RAILROAD COMPANY.

INDIANA NORTH AND SOUTH RAILROAD CO. v. CITY OF ATTICA.

The statutes of Indiana permit municipal corporations to make donations and subscriptions to the capital stock of railroad corporations, and to issue bonds accordingly. The city of Attica issued certain bonds in consideration of the location of the shops of a railroad company within the limits of the city. *Held*, that the bonds were illegally issued.

THE opinion of the court was delivered by

HOWK, J. The appellant, as plaintiff, filed a duly verified complaint, in the court below, against the appellee, as defendant.

In said complaint the appellant alleged, in substance, that on the 13th day of February, 1871, the appellant, being then engaged in the construction of its railway, running through portions of Fountain County, Indiana, and upon which railway the city of Attica was situated, a majority of the freehold citizens of said city, two hundred and eight in number, petitioned the mayor and common council of said city of Attica to cause to be issued and donated to the appellant by the appellee, to aid in the construction of appellant's railway, sixty thousand dollars, in bonds of said city, — one half of the amount in bonds of \$500 each, and the residue in bonds of \$1,000 each; said bonds payable in ten years from date of issue, reserving the right to extend to twenty years, with interest at the rate of seven per cent. per annum, payable semi-annually at the First National Bank of Attica, Indiana, and providing that said bonds should be issued as soon as could conveniently be done, of the date of March 1st, 1871, and made payable to James D. McDonald, Peter S. Veeder, and John Nava, trustees, or order, to be by them delivered to the appellant, when the appellant had completed its road from Attica to or near Coal-field Station, in said Fountain County, so far as to admit the running of a

train of cars between said city of Attica and said station; the said railway to be constructed through the central portion of Fountain County, commencing at Attica and crossing the Indianapolis, Bloomington, and Western Railway, near Coalfield Station, in said county; a copy of which petition was filed with and made part of said complaint. And the appellant said, that on said first named day the prayer of said petition was granted by a unanimous vote of the common council of said city of Attica; that the appellant accepted said petition and the granting thereof by said common council, in its behalf and as aid to the construction of its said road, and did construct and complete its said road from said city of Attica, through the central portion of said Fountain County, to the point at which its line of road crossed the Indianapolis, Bloomington, and Western Railway, in said county, at or near said Coalfield Station (now called Veedersburg), so as to admit of the running of trains of cars over said road between said points, by April, 1872; and that from April, 1872, continuously up to the commencement of this suit, appellant had caused trains of cars to be run over said road between said city of Attica and said crossing or junction with the Indianapolis, Bloomington, and Western Railway. And appellant further averred, that the appellant, on or about the 29th day of May, 1872, by its board of directors, passed an order permanently locating the machine shops of said road, whenever the same should be built, at the city of Attica, which said order remained in full force and unrevoked; that the appellant had fully kept and complied with all the requirements and conditions of said petition, and did so keep and comply with the same by the month of April, 1872, and that in said month of April, 1872, the appellant became and was entitled to said sixty thousand dollars of bonds, in said petition named, and had ever since been and still was entitled to said bonds, and the interest thereon. And appellant said, that the appellant had repeatedly demanded said bonds from the mayor and common council of said city of Attica, and that the appellee, by its said officers, had and still neglected and refused to deliver, or cause to be delivered, to the appellant, the said bonds, or any part thereof.

Wherefore, and by reason of the facts above stated, the appellant prayed judgment, that a mandate might issue from the court below, ordering and directing the mayor and common council of said city of Attica, and the proper officers of said city, to issue and deliver, or cause to be delivered, to appellant, said sum of sixty thousand dollars, in the bonds of said city, in accordance with said petition set forth in said complaint; and appellant prayed judgment against the appellee for seventy-five thousand dollars, and for all other proper relief.

The petition of the freeholders of the city of Attica, which was made a part of appellant's verified complaint, by copy thereof filed therewith, is in the words and figures following, to wit:—

“To the Mayor and Common Council of the City of Attica, Fountain County, Indiana.

“The undersigned respectfully represent, that they are resident freeholders and citizens of the city of Attica, Indiana, and they petition your honorable body to cause to be issued and donated, by the city of Attica, to the Indiana North and South Railway Company, the line of which

runs through or near the corporate limits of said city, to aid in its construction, sixty thousand (60,000) dollars, one half thereof in bonds of five hundred (500) dollars each, and the residue in bonds of one thousand (1,000) dollars each, and payable in ten years from date of issue, reserving the right to extend to twenty (20) years, with interest at the rate of seven (7) per cent. per annum, payable semi-annually at the First National Bank of Attica, Indiana, and provided that the said bonds shall be issued as soon as can conveniently be done, of date of the 1st of March, 1871, and made payable to James D. McDonald, Peter S. Veeder, and John Nava, trustees, or order, to be held by them in the trust that they will deliver the same to the said railway company, when they shall have completed their road from Attica to or near Coalfield Station, in said Fountain County, so far as to admit the running of a train of cars between the above named points, and the iron laid to admit of running of trains. The said railway to be constructed through the central portion of Fountain County, commencing at Attica, in Fountain County, crossing the Indianapolis, Bloomington, and Western Railroad, near Coalfield Station, in said county. The donation to (be) made upon the consideration that said railway company shall permanently locate and maintain their shops for the manufacture of their rolling stock in or adjacent to the city of Attica, and on failure so to do, said company are to reimburse said city in the sum of sixty thousand (60,000) dollars."

To appellant's said complaint, the appellee answered in four paragraphs. The appellant demurred, separately and severally, to the second, third, and fourth paragraphs of appellee's answer, alleging as the ground of objection to each of said paragraphs, that it did not state facts sufficient to constitute a defence to appellant's action. As to the second and fourth paragraphs of answer, appellant's demurrer thereto was sustained by the court below, and appellee excepted; and as to the third paragraph of answer, the demurrer was overruled, and to this decision appellant excepted. No question is made in this court, upon the rulings of the court below on the second and fourth paragraphs of answer, and they need not be further noticed.

The first paragraph of appellee's answer is a general denial of the allegations of appellant's complaint.

In the third paragraph of its answer, the appellee alleged, in substance, that it admitted, that the appellant petitioned the appellee in, with, and by the petition, set forth in appellant's complaint by exhibit, at the time averred in said complaint, to wit, the 13th day of February, 1871; that two days afterwards, on the 15th day of February, 1871, the appellee, by its city council, met, at which meeting Edgar B. Thomas, Esq., appellant's president, was present; and at said meeting said city council passed an ordinance to carry out and put into full force and effect the substantial requirements of the said petition; which said ordinance, with the preliminary proceedings had by said city council and the adoption thereof, was by copy of the record of said city appended to said answer, as an exhibit; that the said Thomas then and there expressed himself as fully satisfied with all the provisions of said ordinance; that afterwards, to wit, on the 13th day of November, 1871, the appellant presented a communication to appellee's common council, setting forth *inter alia*, that appellant was

unable to furnish security, as was by said ordinance contemplated, and proposing to furnish another and different security in lieu thereof, as shown by copy of the records of said city, appended to said answer as an exhibit; that said proposition was not entertained by said city council; that afterwards, to wit, on the 27th day of November, 1871, the appellant presented a communication to appellee's city council, wherein the appellant set forth the passage of certain resolutions locating their machine shop in said city of Attica, on condition of the reception of sixty thousand (60,000) dollars, in the bonds of said city, as by the petition called for, — otherwise not, — all of which would more fully appear, if reference were had to Exhibit "G," annexed to said answer; and a committee was appointed to report on said proposition, as said last named exhibit would show; that on the 8th day of January, 1872, the said committee reported a declination of the appellant's last named proposition, and their report was concurred in, as would appear by reference to Exhibit "H," appended to said answer; that the appellant had not located any shop in the city of Attica, for the manufacture of its rolling stock, as by the said petition and the said ordinance required; that appellant had not executed and delivered to the mayor of the city of Attica a bond to the city of Attica, Indiana, in the penal sum of sixty thousand dollars, with good and solvent security to the approval of the common council of said city, conditioned that the appellant should faithfully and fully perform the stipulations set forth in the petition authorizing the said donation of sixty thousand dollars, to wit, "that said railway company shall permanently locate and maintain their shops for the manufacture of their rolling stock, in or adjacent to the city of Attica, and, on failure so to do, to reimburse said city of Attica in the sum of sixty thousand dollars, as by the terms of said ordinance" (copied in Exhibit "B," section six thereof), required; and that the appellant was not entitled to have said sixty thousand dollars of bonds, until it furnished the said penal bond. Wherefore, appellee prayed judgment for costs.

As before stated, appellant's demurrer to this paragraph of answer, for the want of sufficient facts therein, was overruled by the court below, and by the appellant excepted to. We will hereafter notice and consider such of the exhibits, mentioned in and made parts of this paragraph of answer, as we may deem material and necessary to the proper understanding and decision of this cause.

And the appellant replied to this third paragraph of answer by a general denial of the matters alleged therein. And the action, being at issue, was tried by the court below, without a jury; which trial resulted in a finding made and judgment rendered by the court, in favor of the appellee and against the appellant.

Upon written causes filed, the appellant moved the court below for a new trial of this action; which motion was overruled by the court, and to this decision the appellant excepted. The evidence on the trial, in the court below, is properly in the record.

In this court the appellant has assigned the following alleged errors:—

1. The court below erred in overruling appellant's demurrer to the third paragraph of appellee's answer; and
2. That the court below erred in overruling the appellant's motion for a new trial.

Practically, these alleged errors present for our consideration the same questions. For, if it can be said that the matters stated in the third paragraph of appellee's answer constitute a defence to appellant's action, it will hardly be claimed by appellant that there is not evidence in the record tending to sustain each material averment in said paragraph of answer.

The questions which underlie this cause, and which must be determined before a right decision can be reached, relate to the sufficiency and legality of the acts and proceedings of the appellee, its resident freehold citizens, and its common council, in connection with its proposed donation to the appellant of sixty thousand dollars. All these acts and proceedings, in their inception and at every step in their progress, must have strictly conformed to and complied with the requirements of law, in order to give the appellant a valid and legal claim to the proposed donation. The law of this state, under which these acts and proceedings were had, is an act entitled "An act to enable cities to aid in the construction of railroads, hydraulic companies, and water powers, and declaring an emergency." Approved May 4th, 1869. By the first section of this act, it is provided as follows: "That any city, incorporated under the general law of this state, upon petition of a majority of the resident freeholders of such city, may hereafter subscribe to the stock of any railroad, hydraulic company, or water power, running into or through such city, or near the corporate limits of said city, or to make, on petition of the majority of the resident freeholders of such city, donations in money or the bonds of such city, to aid in the construction of any such railroad, hydraulic companies, or water power; subject, however, to the limitations, direction, and restriction named in the provisos to the sixtieth section of the act, entitled 'An act to repeal all general laws now in force for the incorporation of cities, prescribing their powers and rights, and the manner in which they shall exercise the same, and to regulate such other matters as properly pertain thereto,' approved March 14th, 1867." 1 R. S. 1876, 299, note 1.

The provisos of the sixtieth section, of the general law of this state for the incorporation of cities, read as follows:—

"*Provided*, That said donations shall not be payable either in money or bonds until the roads or bridges or public improvements or public works, in aid of which it is given, shall be so far completed as to admit the running of trains from the point of commencement to such point or points as are designated in the petition, in case of a railroad or railroad bridges, or the passage of wagons in the case of other roads or bridges, and in case of public improvements or public works upon the completion thereof; and when so far completed it shall be obligatory on the common council of said city to contract and do whatever may be necessary, to carry into effect the substantial meaning of any such petition; and the obligation herein enjoined may be enforced in the courts of this state having competent jurisdiction, on the application of any signer of such petition, or president of any road or bridge company in behalf of which such donation may have been made, at any time after said petition or petitions have been presented to such common council; and for any debt created in pursuance of the provisions of this section in carrying out the intentions of the petitioners aforesaid, the common council shall add to the duplicate

of such years thereafter a levy sufficient to pay the annual interest on such debt or loan, with an addition of not less than five cents on the one hundred dollars to create a sinking fund for the liquidation of the principal thereof, which fund with all the increase thereof shall be applied to the payment of such debt and to no other purpose." 1 R. S. 1876, 299.

The above is all the legislation of this state, directly applicable to the matters now under consideration. The power under which the appellee, its resident freehold citizens, and its common council are supposed to have acted, in the proceedings had by them in connection with appellee's proposed donation to the appellant, is wholly conferred by the said act of May 4th, 1869, which we have set out in full, except a section containing an emergency clause. And "limitations, direction, and restriction" of the power, so conferred, are to be found in the proviso, in the sixtieth section of the general law for the incorporation of cities, which proviso we have also set out in full.

It will be observed, that by the Act of May 4th, 1869, "any city incorporated under the general law of this state, upon petition of a majority of the resident freeholders of such city," may do either one of two things, and only two, in connection with certain private enterprises, of a quasi public nature, mentioned in said act: 1. The city may subscribe to the stock of such enterprise; in which case, in theory at least, the city will get something of value in return for the amount of the subscription. 2. Or, the city may make a donation to such enterprise in aid of its construction; and in this case, the city will get nothing directly, in return for its donation; but the theory of the law is that benefits will enure to the city from the location of the thing constructed, in aid of which the donation is made, in or through such city, or near its corporate limits. These two things, and only these, the city may lawfully do, under and by virtue of the power conferred in and by the said act, in the mode therein prescribed. And under the power so conferred, the city may not, in our opinion, under the name of a donation, make a valid and legal contract, whereby, in consideration that a railroad company will locate and maintain its machine shops in or near such city, or will do any other act or thing of value, the city will give or donate to such railroad company the sum of sixty thousand dollars, or any other sum, therefor. The act in question was not passed, as we think, to enable cities to make contracts of bargain and sale, under the color or name of donations; and such a contract as the one we have mentioned was certainly not provided for, in or by the terms of said act.

A donation is defined by Bouvier, to be "the act by which the owner of a thing voluntarily transfers the title and possession of the same, from himself to another person, without any consideration." Webster defines a donation, to be "that which is given or bestowed; that which is transferred to another gratuitously, or without a valuable consideration; a gift; a grant."

In this case, the petition of the resident freeholders of the city of Attica shows upon its face that the idea of a donation or gift was not in the minds of the petitioners at the time the petition was signed. The petitioners prayed the appellee's common council, not to make a donation or gift to the appellant, but, under the name of a donation, "upon the considera-

tion" expressed in the petition, they prayed the common council to give a certain sum in bonds, as the purchase money for a certain thing, the price of which had been, before that time, apparently agreed upon. The language used in the petition was, that the proposed donation was to be "made upon the consideration that said railway company shall permanently locate and maintain their shops for the manufacture of their rolling stock in or adjacent to the city of Attica, and on failure so to do said company are to reimburse said city in the sum of sixty thousand (60,000) dollars." The last clause of this language, quoted from the petition, is inconsistent with, and, in fact, utterly precludes the idea of any donation or gift, by the appellee to the appellant, as a matter even contemplated by the petitioners. Fairly construed and interpreted, the petition shows that the appellant had in view the erection and maintenance of machine shops, at some point, for the manufacture of its rolling stock; a majority of the resident freeholders of the city of Attica were desirous of securing the location and maintenance of these machine shops in or adjacent to said city of Attica; and for the purpose of securing such location and maintenance of said machine shops, and not for the purpose of aiding in the construction of appellant's railroad, these resident freeholders presented their said petition to appellee's common council, praying nominally for a donation to the appellant, but really for the purchase from the appellant of the location and maintenance of its machine shops, in or adjacent to said city of Attica, at and for the said sum of sixty thousand dollars, and stipulating that, on appellant's failure so to locate and maintain its machine shops, the appellant should reimburse the appellee in the same sum of sixty thousand dollars.

This construction of the petition is in harmony with the action had by appellee's common council upon said petition, at the time of its presentation. An ordinance was adopted by said common council, to carry out and give effect to said petition; by the sixth section of which said ordinance it was provided as follows:—

"Sec. 6. That said Indiana North and South Railway Company shall execute and deliver to the mayor of the city of Attica, *prior to the delivery* of the bonds herein provided, a bond to the city of Attica, Indiana, in the penal sum of sixty thousand dollars (\$60,000), with good and solvent security to be approved by the common council, conditioned that the said Indiana North and South Railway Company shall faithfully and fully perform the stipulations set forth in the petition authorizing this donation, to wit: That said railway company shall permanently locate and maintain their shops for the manufacture of their rolling stock, in or adjacent to the city of Attica, and on failure so to do to reimburse said city of Attica in the sum of sixty thousand dollars (\$60,000), else this ordinance to be null and void."

A mere glance at this section of this ordinance will suffice to show that appellee's object, in these proceedings, was not to aid in the construction of appellant's railroad; and that it was not contemplated nor intended by the appellee to make any donation or gift to the appellant, for any purpose. The simple truth is, and the attempt to cover it up under fictitious names and pretences only makes it the more manifest, that the appellant had something to sell and dispose of, which the appellee, and its

citizens and officers, wanted to secure and were willing to pay the price for, if they could be assured of getting the thing purchased, but not otherwise. Therefore, it was stipulated in the petition, and in the ordinance which followed the petition, that, in the event of the appellee's failure to get the thing purchased, the appellant should reimburse the appellee in the price paid therefor. And therefore it was that the appellee's common council, "in carrying out the intentions of the petitioners," in and by the said sixth section of the said ordinance, provided that, prior to the delivery to the appellant of the price agreed upon, or of the donation as it was called, for the location and maintenance of appellant's shops in or adjacent to said city of Attica, the appellant should execute and deliver to the mayor of said city a bond to said city of Attica, in the penal sum of sixty thousand dollars, being the amount of the so-called donation or price agreed upon, and conditioned that the appellant should faithfully and fully perform the stipulations set forth in said petition.

In our opinion, the record of this cause does not show a *bond fide* donation, or intended donation, by the appellee to the appellant, within the purview and meaning of the law, of any sum whatever. On the contrary, we think that the record clearly shows a transaction between the said parties, which the law did not contemplate and has made no provision for. It is perfectly manifest that the appellee did not, nor did its resident freeholders, nor did its common council, ever at any time intend to make any donation, in any sense of the word, to the appellant, either to aid in the construction of its railroad, or for any other purpose. The sole object had in view by appellee's resident freeholders and by its common council evidently was to secure the location and maintenance of appellant's shops, for the manufacture of its rolling stock, in or adjacent to said city of Attica. For this object, but for no other, the appellee was willing to pay the amount mentioned in said petition and ordinance, and that amount the appellant was willing to accept. But before any payment should be made, the appellee insisted that a bond should be given by appellant, with approved security, for the repayment to the appellee of the entire amount paid, in the event of appellant's failure to locate and maintain its said shops, in or adjacent to said city of Attica. Of the said acts and proceedings of appellee's resident freeholders and common council, the appellant, by and through its president, had notice and was fully cognizant at or about the time they occurred.

We hold that the record of this cause shows very conclusively, that there was a contract or agreement of bargain and sale, between the appellant and the appellee, in connection with the location of appellant's machine shops in or near the city of Attica, for a price agreed upon; that the acts and proceedings of the resident freeholders, and of the common council of the said city of Attica, set out in the record, were merely an attempt to accomplish indirectly what could not be done directly, namely, to consummate, under the form and name of a donation, the said contract or agreement of bargain and sale; and that the said acts and proceedings were not authorized by the said Act of May 4th, 1869, or by any other law of this state.

In any view of the case, the petition of the resident freeholders to the common council of the city of Attica was not, in our opinion, a legal peti-

tion under the provisions of the said Act of May 4th, 1869, hereinbefore cited. It contained a direction and restriction on the action of the said common council, in connection with the subject matter of said petition, which are not to be found among "the limitations, direction, and restriction named in the provisos to the sixtieth section" of the general law for the incorporation of cities, and which were therefore not authorized by law. It was not competent for appellee's common council to disregard the consideration clause of said petition, or to reject it as mere surplusage. However unauthorized by law this clause was, yet it was a material part of the petition as presented; and it can be readily seen, that this clause was the means used, the inducement held out, for the purpose of obtaining the signatures of the resident freeholders of the city of Attica to said petition. The clause in question was not warranted by law, and, in our opinion, it vitiated and rendered illegal the entire petition. It was impossible for the common council to overlook this clause. Although illegal, it could not be treated or considered as a mere nullity; for, evidently, it was the consideration and the real foundation of the petition. And so, also, in regard to the action of the common council on said petition, the ordinance adopted, for the purpose of carrying the said petition into effect, cannot be regarded as a mere nullity, simply because the sixth section of said ordinance, following the language in said petition, imposed a direction or restriction upon the appellant, which was not authorized by the law under which the common council acted. If, however, this section of the ordinance had not been grounded upon said petition, and had not evidently been intended to give force and effect to the plain will and intention of the resident freeholders of the city of Attica, as expressed in said petition, we might have regarded it as mere surplusage, or treated it as an absolute nullity.

Upon the whole case, our conclusion is, that the acts and proceedings of the resident freeholders, and of the common council of the said city of Attica, as set forth and contained in the record of this cause, were not sufficient, under the law of this state, to create any liability in favor of the appellant and against the appellee, for the payment of the proposed donation, which the courts of this state can enforce.

The third paragraph of the appellee's answer was a good and sufficient defence to appellee's complaint, upon the theory, at least, that a bad answer is good enough answer to a bad complaint. But upon the theory that there was ever any legal vitality in the proceedings, counted upon by appellant in its complaint as constituting its cause of action, the facts stated in the third paragraph of appellee's answer, in our opinion, constituted a good defence to this cause of action. The court below committed no error in overruling appellant's demurrer to this third paragraph of answer.

And, from what we have already said, it is hardly necessary for us to add, as we do, that in our opinion there was no error in the decision of the court below overruling the appellant's action for a new trial.

The judgment of the court below is affirmed at the costs of the appellant.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

(To appear in 121 Mass.)

HOMESTEAD EXEMPTION. — RIGHTS OF MORTGAGEE.

SEARLE v. CHAPMAN.

On a writ of entry to foreclose a mortgage of a parcel of land which contains a release of all homestead rights, it is no defence that the tenant had acquired a homestead right before the mortgage deed, and that the estate is sufficient to satisfy the mortgage, without having recourse to the homestead.

WRIT OF ENTRY to foreclose a mortgage of a parcel of land in Northampton. Plea, *nul disseisin*, with a specification of defence that the first named tenant had a homestead estate in the land. Trial in the superior court, before Putnam, J., without a jury, who allowed a bill of exceptions in substance as follows:—

The demandant is the assignee of a mortgage given by the first named tenant on May 25, 1863, to secure the payment of \$2,500. The deed contained full covenants of warranty, and a release of dower and homestead. The other tenant is the owner of the equity of redemption of the mortgaged premises.

There was evidence tending to show that the larger part of the premises, described in the mortgage, had been owned and occupied by the tenants and their children since 1853 as a homestead, though no declaration of homestead had been filed.

The tenants contended, and offered evidence tending to prove, that the premises were of sufficient value to satisfy the mortgage debt, without resorting to the part which would be set off as the homestead; and asked the judge to rule that so much of the premises, including the house where the tenants live, of the value of \$800, could not be taken by the mortgagee, in case the other property included in the mortgage was sufficient to satisfy the mortgage debt; but the judge declined so to rule, and ordered judgment for the demandant; and the tenant alleged exceptions.

D. W. Bond & H. H. Bond, for the tenants, cited *McLaughlin v. Hart*, 46 Cal. 638; *Jarboe v. Colvin*, 4 Bush, 70; *Twogood v. Stephens*, 19 Iowa, 405; *Barker v. Rollins*, 30 Iowa, 412; *Chapman v. Lester*, 12 Kansas, 592; *White v. Polleys*, 20 Wisc. 503.

W. G. Bassett, for the demandant, was not called upon.

GRAY, C. J. The mortgage deed having been, as was admitted at the argument, executed by the husband and wife in due form to release all rights of dower and of homestead, those rights, as well as every other title of the husband in the premises, passed to the mortgagee, and were equally liable to him for the payment of the mortgage, and could not be set up either as a ground for redemption or as against a foreclosure, except upon the terms of paying the whole mortgage debt.

The power of a court of chancery to compel a mortgagee to resort in the first instance to one of several estates mortgaged is exercised only for protection of the equities of different creditors or incumbrancers, or of

sureties, and not for the benefit of the mortgagor. As against him, the mortgagee has the right to enforce the contract between them according to its terms, and is not obliged to elect between different remedies or securities. 1 Story Eq. Jur. §§ 640, 645.

The right of homestead, created by our statutes, is certainly entitled to no higher degree of favor than the courts have always accorded to the common law right of dower. The case cannot be distinguished in principle from the ordinary one in which a wife, who has joined by way of releasing dower in the mortgage of her husband, is held to pay the whole mortgage debt, as a condition of asserting her right of dower against the mortgagee. *Gibson v. Crehore*, 5 Pick. 146, 152; *McCabe v. Bellows*, 7 Gray, 148, and 1 Allen, 269; *Davis v. Wetherell*, 13 Allen, 60.

The judgment in *Pittman's Appeal*, 48 Penn. St. 315, is in accordance with our conclusion. The cases in some of the Western States, cited by the learned counsel for the tenants, so far as they countenance any equity in the owner of a right of homestead as against a party in whose favor he has waived or released it, are supported by no reasons, and do not disclose how far they may have been influenced by local statutes.

Exceptions overruled.

CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

[JUNE, 1877.]

REMOVAL OF CAUSES. — JURISDICTION OF FEDERAL COURTS. — ACT OF MARCH 3, 1875.

GIRARDEY v. MOORE.

The Act of March 3, 1875, concerning the removal of causes, warrants a removal in all cases where there are real parties in interest who are citizens of different states upon different sides. It is not necessary that all the parties on one side and all the parties on the other be citizens of different states.

BRADLEY, J. This cause was commenced in December, 1875, in the superior court of Richmond County, Georgia, and was removed by Moore, one of the defendants, so far as it concerned him, to this court in October, 1876, he being a citizen of Pennsylvania, and the other parties all being citizens of Georgia.

Motion is now made to remand the cause, on the ground that it cannot be thus split into two causes under the existing state of the law. The nature of the case is as follows: The bill charges that certain property in Augusta, known as Lafayette Hall and the Opera House, on which Moore holds a mortgage for twenty-seven thousand dollars, is subject to a trust for the benefit of the complainant, Mrs. Girardey, and her children, paramount to the mortgage; that it was property which was purchased by the defendant, Isidor P. Girardey (her husband), with the

proceeds of other property which he had conveyed upon said trust to the remaining defendant, Bessman, but the deed had not been recorded and was lost; that after the purchase of Lafayette Hall and the Opera House, Girardey borrowed \$27,000 of Moore and gave him the mortgage in question; and that Bessman, the trustee, acted as Moore's agent in making the loan, thus affecting him with notice of the trust. The bill charges Girardey with receiving the rents and profits, and Bessman with breach of trust, and prays an account thereof, and that Moore may be enjoined from selling the property under his mortgage (which he is seeking to do) until the trust has been established, and for general relief.

Moore, in his petition to have the cause removed as to him, states that the controversy in the suit is wholly between him and the complainants, and can be determined as between them without the presence of the other defendants as parties in the cause. His counsel contends that the removal was authorized by the Act of July 27, 1866 (14 Stat. 306), or if that is repealed, then by Act of March 3, 1875. The counsel of complainants insists that the Act of 1866 is repealed by that of 1875, and that the latter does not authorize the removal of a cause in the manner in which this has been removed; and that neither act authorizes this cause to be split in this way.

In order to get at the state of the law on this subject, it will be necessary briefly to review the history of the legislation which has been adopted in relation to the removal of causes from the state to the federal courts, on the ground of the parties being citizens of different states. Without noticing other conditions as to amount, &c., the Judiciary Act of 1789, section 12, authorized a removal where the suit is by a citizen of the state where the suit is brought, and against a citizen of another state. If there were more than one plaintiff or defendant, the courts held that all of the plaintiffs must be citizens of the state where the suit is brought, and that all the defendants must be citizens of other states. The Act of July 27, 1866 (14 Stat. 306), without making any change in the requirement as to the citizenship of the plaintiffs in the state where the suit is brought, authorized a removal of the suit, so far as it relates to a defendant who is a citizen of another state, though there are other defendants citizens of the state in which the suit is brought, if, so far as it relates to the former, it is brought for the purpose of restraining or enjoining him, or is a suit in which there can be a final determination of the controversy, so far as concerns him, without the presence of the other defendants as parties in the cause. Both of these acts give the right to remove the cause to the defendant alone. The Act of March 2, 1867 (14 Stat. 558), gives the right of removal, when a suit is between a citizen of the state where the suit is brought and a citizen of another state, to the latter, whether plaintiff or defendant, on his making affidavit that he has reason to believe that, from prejudice or local influence, he will not be able to obtain justice in the state court. This act, like the Act of 1789, has been held to apply only to cases where all the parties on one side are citizens of the state where the suit is brought, and all the parties on the other side are citizens of another state or other states. Lastly, the Act of March 3, 1875 (18 Stat. 470) gives a right of removal to either party in every suit in which there is a controversy between citizens of different states;

and where the controversy is wholly between citizens of different states, and can be fully determined on between them, it authorizes any one or more of the plaintiffs or defendants, actually interested in such controversy, to remove the suit. This act repeals all acts and parts of acts *in conflict* therewith.

The Act of 1875 undoubtedly greatly enlarges the class of cases which may be removed from the state into the federal courts, and a more careful examination of it may be useful on this occasion. Before this Congress had never invested the federal courts with jurisdiction arising from diverse citizenship of litigant parties coextensive with the judicial power conferred upon the general government. Subject to a limitation as to the amount in controversy, this was attempted to be done by that act. It declares, in section first, that the circuit court of the United States shall have original cognizance (concurrent with the courts of the several states) of all suits of a civil nature at common law or in equity, in which there shall be a controversy between citizens of different states; and in the second section it gives to either party in such suit, as we have seen, the right to remove the same from a state court (if originally commenced there) to the circuit court. And where the controversy is wholly between citizens of different states, and can be fully determined as between them, it authorizes any one or more of several plaintiffs, or of several defendants, thus to remove the suit. The true interpretation of this statute involves the true interpretation of the constitutional power. The jurisdiction given to the circuit court is as broad as the judicial power.

Now, as to the extent of the judicial power I never had a doubt. My view may not be the correct one, but it is that which I have ever entertained; and, as yet, there has been no decision of the supreme court to the contrary, whatever *dicta* may have dropped from different judges; and it is this: that whenever the controversy in a suit is between citizens of different states, it is within the judicial power of the United States, though there are other persons in the case citizens of the same state with a person or persons on the opposite side to them. The grant of judicial power is in the affirmative; it extends to controversies (and of course to all controversies) between citizens of different states. There is no negative; no exception of any cases in which the same controversy has also citizens of the same state on the two sides thereof. If the controversy involved is a controversy between citizens of different states, it is within the term, and, I think, within the spirit, of the power granted. The constitutional language cannot be satisfied without giving it this construction. To say that it only embraces those controversies in which all the parties on one side and all the parties on the other side are citizens of different states, is to interpolate a limitation in the Constitution which is not found there.

Of course, persons who are only nominally interested in the controversy cannot confer jurisdiction and cannot take it away. This has been frequently decided under the former laws.

It is objected to this view that it would be attended with great inconvenience, by having the effect of giving jurisdiction to the federal courts in cases where only a single one of many plaintiffs or defendants happened to be a citizen of another state. But the contrary view would be

attended with equal inconvenience; for cases would arise (as they have often arisen under the old law as construed by the courts) in which one of many plaintiffs or defendants, happening to be a citizen of the same state with one of the parties on the opposite side, has defeated the jurisdiction. Extreme cases of the sort would undoubtedly arise whichever view may be taken, but no intermediate view can be taken which will avoid them. The argument *ab inconvenienti* is worth nothing, for it neutralizes itself by equal weight on both sides.

I do not regard the construction given to the old judiciary act as at all conclusive on this question. I refer to those decisions in which it was held that all the plaintiffs must be citizens of the state where the suit was brought, and all the defendants must be citizens of other states. They were made upon the peculiar language of that act, and took their origin at a period when a strict construction of the federal jurisdiction in judicial matters was in vogue. The circumstances which induced this tendency are familiar to every student of American history.

If I am right in my construction of the Act of March 3, 1875, the right of removing a cause from the state court to the circuit court of the United States exists in all cases where there are substantial parties, citizens of different states, on opposite sides of the cause, although there are parties on opposite sides who are citizens of the same state.

But then arises the question: To whom is the right of removal given? The answer to this question, as derived from the second section, is, that it is given to either party, that is, to the plaintiffs or the defendants, in either case acting collectively; and where the controversy is wholly between citizens of different states, and can be determined as between them, the right is given to any one or more of the plaintiffs or defendants actually interested in the controversy. In other words, if some of the plaintiffs and defendants are citizens of the same state, the removal must be sought by all the defendants. One of the several plaintiffs or one of the several defendants cannot in this case remove the cause. But if all the plaintiffs on the one hand, and all the defendants on the other, are citizens of different states, then it does not require all the plaintiffs nor all the defendants to remove the cause, but any one or more of either may do it. But in either case it is the suit that is removed, and not a part of the suit.

If my construction of the Act of 1875 is correct, it is clear that the removal of the cause could not be had under that act unless Bessman and Girardey are to be regarded as merely nominal parties, and the real controversy in the suit is wholly between the complainants and the defendant Moore, as stated by the latter in his petition for removal. It is not at all improbable that the principal object of the suit was to defeat Moore's mortgage; but the frame of the bill is conceived for the purpose of establishing the trust, and the postponement of the mortgage as a consequence thereof; and Bessman being the alleged trustee, and Girardey being the owner of the property to be affected, it cannot be said that the controversy in the suit is wholly between the complainants and Moore. His controversy with the complainants may, it is true, be disposed of separately. But under the Act of 1875, the whole suit must be removed, or no removal at all can take place. It becomes important, therefore, to determine whether

the Act of 1875 has repealed the Act of 1866. If it has, the case is ended here. If it has not, then the removal may perhaps be supported by the latter act.

The Act of 1875 does not profess to repeal any acts, or parts of acts, which are in conflict with it. Is that part of the Act of 1866, which authorizes one defendant, if a citizen of another state, to separate his case from that of the other defendants who are citizens of the state where the suit is brought, and to remove it into the federal court, in conflict with anything in the Act of 1875? Cannot both stand together? In a case like the present, the Act of 1875, as I understand it, would authorize all the plaintiffs or all the defendants, collectively, to remove the whole suit. The Act of 1866 authorizes a defendant, not being a citizen of Georgia, to remove the case as to him, if there can be a final determination of the controversy, so far as he is concerned, without the presence of the other defendants as parties in the cause. It seems to me that there is no conflict here, no reason why both acts should not stand. I conclude, therefore, that the Act of 1866, so far as it authorizes a defendant to remove a cause as to him, is not repealed by the Act of 1875.

And I see no reason why the controversy between the complainants and Moore cannot be finally terminated without the presence of the other defendants. Had the complainants filed the bill against Moore alone, he could have demurred to it for want of parties. He had obtained an order to issue a *fi. fa.* for sale of the mortgaged premises, and had issued the writ, and the sheriff had advertised the property for sale. The bill, on the facts alleged in it, would well have lain against him alone to enjoin him from selling the property, and to establish the trust as against his mortgage. The other defendants would have been proper parties, but I think they would not have been necessary parties to the case.

If this view is correct, this controversy between him and the complainants may be determined without the presence of the other defendants as parties in the cause.

The motion to remand the cause is refused.

SUPREME COURT COMMISSION OF OHIO.

(To appear in 28 Ohio St.)

CORPORATION. — REMOVAL OF CAUSES. — THE OHIO STATUTE.

BALTIMORE AND OHIO RAILROAD CO. *vs.* CARY.

1. Under the clause of the Constitution of the United States, extending the judicial power of the United States to controversies between citizens of different states, a corporation, in respect to the jurisdiction of the federal courts, is regarded as a citizen of the state where it was created.
2. A foreign railroad corporation, by merely leasing, possessing, and operating in this state the property of a domestic railroad corporation, does not thereby become an Ohio corporation, nor such citizen of the state.

3. The proviso of the 24th section of the act for the creation and regulation of incorporated companies in Ohio, as amended March 19, 1869 (66 Ohio L. 32), so far as it provides that the leasing, purchasing, or operating a railroad in this state by a railroad company of another state shall be regarded as a waiver of the right of such foreign company to remove cases brought against it in the state courts to those of the United States, is repugnant to the Constitution and laws of the United States, and is, therefore, ineffective as a statutory waiver of the right of such removal.
4. When a corporation of another state, not being a citizen of Ohio, is sued by a citizen of the state, in the state court, it is entitled to have the case, under the 12th section of the Judiciary Act of Congress of 1789, removed from the state court to a United States court.

JOHN CARY brought his action against the Baltimore and Ohio Railroad Company in the court of common pleas of Belmont County, to recover of the company five thousand dollars, as damages for excavations and structures of the company in a street of the city of Bellaire, so as to obstruct the passage to and from the street of his city lots and buildings thereon.

On coming into court, the railroad company filed its petition, setting forth, among other things, that John Cary is a citizen of Ohio; that on the 21st day of June, 1871, he brought said action against the Baltimore and Ohio Railroad Company, which is, and then was, a corporation created by the State of Maryland, and is a citizen of that state; that the company offers good and sufficient surety to do all things required by the act of Congress, approved September 24, 1789, to entitle it to have the case removed to the circuit court of the United States; and prays that the case may be removed into the next circuit court of the United States for the Southern District of Ohio, and that no further proceedings be had in the court of common pleas.

A bond in the sum of a thousand dollars, with proofs of the sufficiency of the surety, was duly filed, as described, and tendered in the petition for removal.

To this petition of the company Cary filed the following answer: —

"John Cary, for answer to the petition of said defendant, says: "It is true, as alleged in said petition, that said Baltimore and Ohio Railroad Company is a corporation, originally created by the laws of the State of Maryland, and that the said plaintiff is, and was at the time of the bringing this suit, a citizen of the State of Ohio.

"The plaintiff further says: That on or about the 21st day of November, A. D. 1866, there was a certain railroad, commonly known as 'The Central Ohio Railroad,' commencing at the city of Columbus, in the State of Ohio, and terminating at Bellaire, in said county and state, said railroad being then and there owned, controlled, and operated by a certain company, known as the Central Ohio Railroad Company, said company having been organized under the laws of the State of Ohio.

"The plaintiff further says: That on the 21st day of November, A. D. 1866, the said Central Ohio Railroad Company, as reorganized, entered into a contract with the said Baltimore and Ohio Railroad Company, by which the latter company was to have the possession of the said Central Ohio Railroad, and control and operate the same for a period of twenty years from the 1st day of December, A. D. 1866.

"The plaintiff for further answer says: That in pursuance of the con-

tract entered into by and between the Central Ohio Railroad Company, as reorganized, and the said Baltimore and Ohio Railroad Company, on the 21st of November, 1866, the said defendant entered into an agreement, on the 1st day of December, 1866, with the said Central Ohio Railroad Company, as reorganized, for operating said Central Ohio Railroad, which agreement provided in article first, 'That the said Baltimore and Ohio Railroad Company should take possession of the entire railroad, appurtenances, and property of every description belonging to the said Central Ohio Railroad Company for twenty years from the 1st day of December, A. D. 1866;' which said article of agreement was, on the 13th day of February, A. D. 1869, modified in this, to wit, 'That the term and possession of the said Baltimore and Ohio Railroad Company to the Central Ohio Railroad and property of the Central Ohio Railroad Company as reorganized, shall be continued for other periods of twenty years, indefinitely,' &c.

"The plaintiff further says: That the said defendants, by virtue of the articles of agreement referred to above, became the lessees and owners of the Central Ohio Railroad, and operated, used, and controlled said road from the 1st day of December, 1866, to the commencement of proceedings herein, to wit, June 21, 1871, and are still the lessees and operators of said railroad, and that on the — day of July, A. D. 1867, being then and there the lessees of said railroad, the said defendant, by an article of agreement executed by the town council of Bellaire, and of the Baltimore and Ohio and Central Ohio Railroad Companies (a full copy of the terms and stipulations of which article of agreement is hereto attached as part of this answer), agreed to construct and build a railroad bridge over the Ohio River, through First Street and across Crescent, Water, Belmont, and Guernsey streets, and the intersecting alleys in said town of Bellaire, in said county and state, for the purpose of continuing said bridge to and connecting the same with the Central Ohio Railroad, and by virtue of said article of agreement did enter upon said First Street, and the above streets and alleys, and made large excavations, built and constructed a railroad bridge in front of said lots in said petition described (as will more fully appear by reference to the petition of said plaintiff, which is here referred to and made a part of this answer).

"Therefore, and by reason of the premises aforesaid, the said John Cary, plaintiff, avers that the said defendant, the Baltimore and Ohio Railroad Company, is, and was at the time of bringing this suit, a citizen of the State of Ohio, and ought not to have this suit removed into the circuit court of the United States, to be held in the Southern District of the State of Ohio, as prayed for in said petition of said defendant."

To this answer the railroad company demurred, and the court overruled the demurrer and dismissed the petition for the removal of the case, to all which the company excepted.

Thereupon the company filed its petition in error in the district court, to reverse the judgment of the common pleas; but that court gave judgment affirming that of the common pleas, and this petition in error was filed in the supreme court to reverse the judgments of the courts below.

J. H. Collins, for plaintiff in error.

D. D. T. Cowen, *contra*.

DAY, J. The Baltimore and Ohio Railroad Company, a foreign corporation, having been sued in the state court by a citizen of the state, sought to remove the case to the United States court, under the twelfth section of the federal Judiciary Act of 1789, which provides that if a suit be commenced in a state court by a citizen of the state against a citizen of another state, when the matter in dispute exceeds five hundred dollars, and the defendant at the time of entering his appearance shall file a petition for the removal of the cause for trial into the next circuit court of the United States, and shall offer good and sufficient security for his proceeding therein, "it shall be the duty of the state court to accept such security, and proceed no further in the case."

It is ordained by the Constitution of the United States that the judicial power of the United States shall extend to controversies "between citizens of different states;" that the laws of the United States, made in pursuance of the Constitution, "shall be the supreme law of the land, and that the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

It is not disputed but that the requisitions of the statute were fully complied with to authorize the removal of the case, if the company was in law entitled to have the case transferred. But the right of the company to have the case removed to the federal court is disputed on two grounds: 1. That the company is a citizen of Ohio; 2. If not such citizen, it has waived the right of removal.

1. The railroad company is a corporation, and is sued by its corporate name. A corporation is an ideal existence, created by legislative enactment, and, in general, it is incapable of being a citizen; but, being endowed by law with the capacity of suing and of being sued, it may become a party to suits in court; and, inasmuch as the jurisdiction of the federal courts is made, in some cases, to depend upon the citizenship of the parties litigant, a corporation, in respect to such jurisdiction, is regarded as a citizen of the state which creates it, and this presumption is now held by the supreme court of the United States to be conclusive. *Railroad Co. v. Wheeler*, 1 Black, 286; *Railroad Co. v. Harris*, 12 Wall. 65; *Railway v. Whitton*, 13 Wall. 270.

The Baltimore and Ohio Railroad Company was incorporated by the State of Maryland, and, therefore, so far as relates to the jurisdiction of the federal courts, is a citizen of that state, and being sued here by a citizen of this state, is entitled to have the case transferred to the federal court, unless, as it is claimed, under the facts of the case, the company may also be regarded as a citizen of Ohio.

If it be assumed that a corporation, within the meaning of the federal judiciary act, may be a citizen of more than one state, do the facts developed by the record in this case warrant a conclusion that the company is such citizen of this state?

It is not pretended that its existence as a corporation depends in any manner upon the legislation of this state; but the claim for regarding the company as a citizen of Ohio is based wholly upon the fact that the company has leased and operates a railroad in this state, owned by another railroad company, which is a corporation created by the State of Ohio, whose corporate existence and powers are in nowise affected by the lease.

It is, then, nothing more than the case of a foreign corporation leasing, possessing, and operating, in this state, the property of a domestic corporation, which does not necessarily constitute the lessee, though a corporation, a citizen of Ohio, for judicial purposes, any more than the same transaction with an individual, being and remaining a citizen of another state, would have that effect.

A corporation is never regarded as a citizen of a state other than that to which it, at least in some measure, owes its being. If, therefore, the corporate existence of this company in no sense depends upon the laws of Ohio, it cannot be regarded as a citizen of the state.

It was held by the supreme court of this state in *State v. Sherman*, 22 Ohio St. 411, that a corporation of another state, though by purchase lawfully vested with the property and all the franchises of a corporation created by this state, without a new organization as a corporation of Ohio, does not become an Ohio corporation; much less would a foreign corporation be constituted an Ohio corporation by becoming the mere lessee of the property of a domestic corporation. The Baltimore and Ohio Railroad Company cannot, therefore, be held to be an Ohio corporation, nor, on that ground, a citizen of this state.

Moreover, it has long been the policy of this state, as manifested by both its judicial and legislative departments, to recognize and protect foreign corporations, in owning property and doing business in this state, under corporate powers derived from their respective states. In *State v. Sherman*, before referred to, it was held that "under the present laws of Ohio, foreign railroad corporations, whose roads lie partly in this state, are accorded the right to own, operate, and maintain their roads in Ohio, in the same manner as domestic railroad companies."

That foreign corporations, allowed to own property and do business in Ohio, are not considered as citizens of the state is evinced by legislative enactments, in some instances requiring them, as a condition precedent to their right to do business in the state, to waive their right, as citizens of other states, to remove cases brought against them in the state courts to the federal courts.

The act authorizing the leasing and operating of railroads in this state by foreign railroad corporations expressly provides that such leasing and operating shall be regarded as a waiver of their right, as citizens of other states, to avail themselves of the jurisdiction of the federal courts.

So far, then, from regarding a foreign railroad corporation, leasing and operating a railroad in this state, as a citizen of the state, the legislature expressly recognizes it to be a citizen of another state, and provides against the exercise of its rights, as such foreign citizen, in this state.

After all, the question of federal jurisdiction, dependent upon the citizenship of the parties, like all questions relating to such jurisdiction, must be controlled by the decisions of the federal court of last resort. *Insurance Co. v. Dunn*, 19 Wall. 214; *Insurance Co. v. Morse*, 20 Wall. 445. In the light of these decisions, we are constrained to hold that, with reference to the jurisdiction of the federal courts, the Baltimore and Ohio Railroad Company, as a corporation of the State of Maryland, is a citizen of that state; that as such corporation, it could not migrate, but might, if permitted by its charter, exercise its faculties in Ohio, in accordance with

and so far as allowed by the laws of the state; and that, under the facts of this case, it cannot be regarded as a corporation or citizen of Ohio. *Railroad Co. v. Harris*, 12 Wall. 65.

2. But it is claimed that, if the company is not held to be a citizen of Ohio, it must nevertheless be regarded as having waived its right, as a citizen of another state, to remove cases brought against it in the state courts to those of the United States.

This claim is founded alone upon the concluding proviso of the twenty-fourth section of the act providing for the creation and regulation of incorporated companies, as amended March 19, 1869 (66 Ohio L. 321), which is as follows: "Provided, further, that it shall be regarded as one of the conditions upon which a railroad company of another state may lease or purchase a railroad, the whole or any part of which is in this state, or make any arrangement for operating the same under the provisions of this section, that such railroad company of another state thereby waives the right to remove any case from any of the courts of this state to any of the courts of the United States, or to bring a suit in any of the courts of the United States against any citizen of this state; and a violation of such condition shall operate as a forfeiture of all rights acquired under such lease, purchase, or arrangement."

Apart from all considerations to the contrary, growing out of the fact that all the rights of the Baltimore and Ohio Railroad Company were acquired by contract before the enactment of this proviso, if it be viewed as applicable to the case before us, so far as regards the waiver provided for, it is open to the objection made to a similar provision, which was considered in the case of the *Assurance Co. v. Pierce*, 27 Ohio St. 155. In that case it was held by this court, upon the authority of the tribunal of last resort, upon the question, that a statute of Ohio, which requires a foreign insurance company, as a condition precedent to its right to transact business in the state, to waive its right to remove cases brought against it in the state courts to the federal courts, is, so far as regards such waiver, repugnant to the Constitution and laws of the United States, and therefore void.

The case of *The Home Ins. Co. v. Morse*, 20 Wall. 445, which was followed in that case, embraces, in the principles determined, all foreign corporations alike, and is as clearly conclusive of the invalidity of the statutory waiver relied upon in this case, as it was of the invalidity of the statute relied upon in that. We are, therefore, equally bound to follow it in this case, and must, for the reasons stated in that case, hold the proviso in question ineffective as a waiver of the right to remove cases to the federal courts.

It results that the judgment of the district court and that of the common pleas must be reversed.

The cause will be remanded to the court of common pleas, to be proceeded with according to law.

ASHBURN, J., dissented from the third point in the syllabus.

JOHNSON, J. I am unable to concur in the opinion announced in this case.

The magnitude of the interests, both public and private, affected by the conclusions reached, warrants me in placing upon record the reasons for this dissent.

The action below was brought by Cary, a citizen of Ohio, in the court of common pleas of Belmont County, to recover damages for injuries to his real estate, committed by the defendant, a corporation styled "The Baltimore and Ohio Railroad Company," while that corporation was engaged in extending the Central Ohio Railroad track to connect the same with a bridge across the Ohio River, at Bellaire, in said county.

The damages claimed exceeded five hundred dollars. The defendant filed a petition for a removal to the circuit court of the United States, on the ground that it is "a corporation *created* by the laws of the State of Maryland, and was therefore, at the time the suit was brought, and now is, a citizen of the State of Maryland, and is to be so regarded for the purposes of this petition.

The plaintiff's answer admits that the Baltimore and Ohio Railroad Company was *originally* created by the laws of the State of Maryland, but avers that as to this action it was and is a citizen of the State of Ohio; that such corporation, under authority of the laws of Ohio, *leased* from the Central Ohio Railroad Company as reorganized, its road, with all its corporate powers conferred by Ohio law, and as such *lessee* it derives all its powers, franchises, and privileges from such lease, and the laws of Ohio, under which said road is owned and operated by defendant.

It appears from the answer that this lease is in perpetuity, and therefore it is averred that the defendant is the lessee and owner of the road, and as such committed the grievances complained of, on the line of the Central Ohio Railroad, in the State of Ohio. To this the defendant demurred. This demurrer presented the single question, whether, upon the facts thus admitted, the defendant in this action is to be regarded as a citizen of Ohio or of Maryland, within the meaning of article 3, section 2, of the Constitution of the United States, and of the Act of 1789.

Is a corporation, originally created by the State of Maryland, and subsequently authorized by the laws of Ohio, to become the lessee of an Ohio road, constructed, operated, and leased solely under Ohio laws, which confer on the lessees no further or greater powers, franchises, or privileges than was possessed by the lessors, responsible as a citizen of Ohio for acts committed within this state in the exercise of the powers and franchises conferred by such lease, where under such laws it is liable to be served with process within this state?

When narrowed down, the question resolves itself into this: What is the test of *citizenship* of a corporation, within the meaning of the judiciary article of the Constitution of the United States?

In the case of the *Bank of Augusta v. Earle*, 13 Peters, 512, it was held: "That the artificial person, or legal entity, known to the common law as a corporation, can have no legal existence out of the bounds of the sovereignty by which it is created; that it exists only in contemplation of law and by force of law, and where that law ceases to operate, the corporation can have no legal existence. It must dwell in the place of creation." This doctrine has been repeatedly affirmed, and especially in *Paul v. Virginia*, 8 Wallace, 168; *Lafayette Insurance Co. v. French*, 18 Howard, 407; *Ohio & Mississippi Railroad Co. v. Wheeler*, 1 Black, 295.

Long before the case of the *Bank of Augusta v. Earle*, it had been de-

cided that a corporation was not a citizen, within the meaning of this article of the Constitution of the United States, unless the persons who compose the corporate body were *all* citizens of the state wherein it exercises its corporate powers.

In such case it was regarded as the joint suit of the individuals acting under the name conferred upon them, and consequently entitled to maintain such suit against the citizen of another state in the corporate name. *Hope Insurance Company v. Boardman*, 5 Cranch, 57; *U. S. Bank v. Devaux*, 5 Cranch, 61; *U. S. v. Planters' Bank*, 9 Wheat. 410; *Commercial Bank v. Slocum*, 14 Pet. 60.

In the case of *The Louisville, C. & C. R. R. Co. v. Letson*, 2 Howard, 497, after grave consideration, it was held, modifying the former ruling, that the court would not look to the actual residence of the members of the corporation, but would presume they were citizens of the same state, in which alone the corporate body has a legal existence, and that a suit by or against a corporation, in its corporate name, must be presumed to be a suit by or against citizens of the state creating the corporate body; and that no averment or evidence to the contrary is admissible, for the purpose of withdrawing the suit from the jurisdiction of a court of the United States.

In that case, which was ably argued and carefully considered, it was sought to oust the federal court of jurisdiction because some of the stockholders were not citizens of the state where the corporation existed and was sued.

The syllabus on this point was: "A corporation created by, and transacting business in a state, is to be deemed an inhabitant of the state, capable of being treated as a citizen, for all the purposes of suing and being sued, and an averment of the facts of its creation and the place of transacting business is sufficient to give the circuit courts jurisdiction."

In the opinion of the court, it is said: "A corporation created by a state, to perform its functions under the authority of that state, and only suable there, though it may have members out of the state, seems to us to be a person, though an artificial one, inhabiting and belonging to that state, and therefore entitled, for the purpose of suing and being sued, to be deemed a citizen of that state." Again: "Like a citizen it makes contracts, and though in regard to what it may do in some particulars, it differs from a natural person, and in this especially, the manner in which it can sue and be sued, it is substantially, within the meaning of the law, a citizen of the state which created it and where its business is done, for all the purposes of suing and being sued."

This subject again came before the court in *Marshall v. The B. & O. R. R. Co.* 16 Howard, 314. That was a suit by a citizen of Virginia, in the circuit court of Maryland, against the defendant, as a body incorporated by the laws of Maryland.

In that case the court say: "The necessities and conveniences of trade and business require that such numerous associates and stockholders should act by representation, and have the faculty of contracting, suing, and being sued in a fictitious or collective name. It is not reasonable that those who deal with such persons should be deprived of valuable privileges by a syllogism, or rather sophism, which deals subtly with words and names,

without regard to the things or persons they represent." . . . "For all the purposes of acting, contracting, and judicial remedy, they can speak and act and plead only through their representatives or curators."

"The persons who act under these faculties, and use this corporate name, may be justly presumed to be resident in the state which is the necessary *habitat* of the corporation."

Perhaps no case throws more light on the problem before us than *The Ohio & Mississippi R. R. Co. v. Wheeler*, 1 Black, 295. That was an action by the corporation, described as having been "created by the laws of the states of Indiana and Ohio, and having its principal place of business in Cincinnati, in the State of Ohio, a citizen of Ohio," brought in the United States circuit court of Indiana, against the defendant, a citizen of Indiana, who pleaded to the jurisdiction on the ground that the defendant was also a citizen of the same state, being a body corporate, by virtue of a law of the State of Indiana, under which the road was built and operated. The plea was sustained, on the ground that the corporation was, in fact, a citizen of Indiana. It was held: That a corporation, endowed with capacities and faculties by the coöperating legislation of two states, cannot have one and the same legal being in both states; that the legal entity or person which exists by force of law can have no existence beyond the limits of the state which gives it life and power to act; and that the corporation in Indiana is a separate and distinct body from that of the same name in Ohio, and that "they cannot be joined in a suit as one and the same plaintiff, nor maintain a suit in that name against a citizen of Indiana or Ohio in a circuit court of the United States."

The significance of this decision consists in the holding that, although this corporation was operating one continuous line of railway in two states, with its principal office and place of business in Ohio, yet, because it owed its right to build and operate its road in Indiana to the legislation of that state, it was, in fact, for the purposes of citizenship, two distinct corporations, one a citizen of that state, the other of Ohio, and could sue in neither state in the courts of the United States. In legal effect, it was two corporations uniting as one plaintiff, the one being a citizen of Indiana, the other of Ohio.

Insurance Company v. Francis, 11 Wall. 415, presented this question, upon this state of facts: The Germania Fire Insurance Company, which was incorporated by and had its head office in New York, established an agency in Aberdeen, Mississippi, and the averment was, "a corporation of New York, located in Aberdeen, and doing business there." The court held that this allegation was, in legal effect, that the company was a citizen of New York, following the cases of *O. & M. R. R. Co. v. Wheeler*, and *Louisville R. R. Co. v. Litson*, adding, as the reason: "Because a corporation can have no legal existence outside of the sovereignty which created it. Its place of residence is there, and nowhere else."

The next case in order is that of *The B. & O. R. R. Co. v. Harris*, 12 How. 65, which was twice argued. The company had a charter from the State of Maryland, to build and operate a road from Baltimore to the Ohio River, and from the same point, by subsequent grant, to run a branch to the District of Columbia.

Subsequently, the State of Virginia granted to that corporation the same rights in that state as it had in Maryland.

Congress also authorized the company to extend its branch into the District of Columbia. The question was, whether the corporation could be sued in the courts of the District of Columbia for injuries received as a passenger on the road in the State of Virginia. The office of the corporation, where its board met and transacted business, was in Baltimore. The writ was served on the president of the company, within the district. The jurisdiction of the court was limited to "inhabitants of the district, or persons found within the district."

It was claimed by the company, on the authority of *The O. & M. R. Co. v. Wheeler*, that, as a corporation of Maryland, it was not an inhabitant of the District of Columbia; but it was held: That the acts of Congress, and of the State of Virginia, were in the nature of enabling acts, and not, as in the *Wheeler* case, acts creating new corporations, when the unity of the road was unchanged in name, locality, election, and power of officers, mode of declaring dividends, and doing all its business, and that, in such case, no new corporation was created, and that in view of such unity, it was liable as an inhabitant of the District of Columbia.

The same question that arose in the *Wheeler* case was again before the court in *Railway v. Whitten*, 13 Wall. 270. That was an action against the Chicago and Northwestern Railway Company, brought in one of the state courts of Wisconsin, to recover over \$500. After service, the plaintiff, who was a citizen of Illinois, moved for a transfer to the circuit court of the United States for the District of Wisconsin. The motion was resisted on the ground that the defendant was a corporation existing under the laws of Illinois, Wisconsin, and Michigan, and its line of railway was located and operated in each of those states; that its entire line of railway was managed and controlled by a single corporation; that all its powers and franchises were exercised, and its affairs managed and controlled, by one board of directors and officers; that its principal office and place of business was at the city of Chicago in Illinois; and that there was no office for the control or management of the general business and affairs of the corporation in Wisconsin.

The grounds for the motion were that the plaintiff was a citizen of Illinois, and the defendant was a citizen of Wisconsin. The company resisted the removal on the ground that it was a corporation by the laws of Illinois, Wisconsin, and Michigan, with its board of officers and headquarters at Chicago, and with no office for the management of its corporate business in the latter state. It was held, upon this state of facts, that the corporation being sued in Wisconsin, it could only be brought into court as a citizen of that state, whatever its citizenship was elsewhere.

The language of the court was: "The plaintiff is a citizen of the State of Illinois, and the defendant is a corporation created under the laws of Wisconsin. Although a corporation, being an artificial body created by legislative power, is not a citizen within several provisions of the Constitution; yet it has been held, and that must now be regarded as settled law, that where rights of action are to be enforced, it will be considered as a citizen of the state where it was created, within the clause extending the judicial power of the United States to controversies between citizens of different states. The defendant therefore must be regarded, for the pur-

poses of this action, as a citizen of Wisconsin. But it is said, and here the objection to the jurisdiction arises, that the defendant is also a corporation under the laws of Illinois, and therefore is also a citizen of the same state with the plaintiff. The answer to this proposition is obvious. In Wisconsin, the laws of Illinois have no operation. The defendant is a corporation, and as such a citizen of Wisconsin by the laws of that state. Being there sued, it can only be brought into court as a citizen of that state, whatever its *status* or citizenship may be elsewhere." 13 Wall. 288.

Referring to the case of the *O. & M. R. R. Co. v. Wheeler*, the court says, that neither state could confer on the company corporate existence in the others, nor add to or diminish the powers then exercised, and although composed of and representing under the corporate name the same natural persons, yet its legal entity, which existed by force of law, could have no legal existence beyond the state which brought it into life, and endowed it with its faculties and powers.

Here was a corporation with a continuous line of road and principal office, where all its corporate powers were exercised in one state, but owing its right to operate the road to the legislation of several states through which it passed, held to be a citizen of any one of such states where, by the law authorizing it to do so, it could be sued. In *Lafayette v. French*, 18 How. 404, it was held that a state could impose on a foreign corporation, as a condition to its doing business in such state, that it should be liable to be sued therein; and the court say, "being sued there, it can only be brought into court as a citizen of that state, whatever its *status* elsewhere." We think this case is decisive of the one at bar. In both cases, the court looks to the state which endowed the corporation with its faculties and powers and where it may be sued, to determine its citizenship regardless of its *status* elsewhere.

In *The B. & O. R. R. Co. v. Gallahur*, 12 Gratt. 655, it was held that the Baltimore and Ohio Railroad Company was a Virginia corporation by virtue of the legislation of that state, wherein it was provided (after reciting the charter of the company as enacted by the State of Maryland), that the corporation thus created should have all the rights and be subject to all the obligations in Virginia, as conferred or imposed on the company in the State of Maryland.

So, in *Maryland v. The Northern Central R. R. Co.* 18 Md. 193, it was held that a corporation owing its existence in part to the State of Maryland, and in part to the State of Pennsylvania, formed by the consolidation of corporations existing by separate acts of those states, and exercising its franchises and owning and operating its line of road in each state, must, for the purposes of justice, be regarded in the courts of each state from which it derives its being as a domestic corporation to the extent of the state in which it acts, and as a foreign corporation as to the other sources of its existence.

Where there was one corporation, owning and operating a continuous line of railway through two states, formed by uniting two distinct corporations, one created by each state, and both united by the acts of the two states, it was held that this constituted it a domestic corporation of each of the states. *Sprague v. The H. P. & F. R. R. Co.* 5 R. I. 233.

In *Goshorn v. Supervisors*, 1 West Va. 308, the Hempfield Railroad

Co. was incorporated by Pennsylvania to build a road from Greensburg, in that state, to the boundary line; and the State of Virginia afterward authorized it to extend its road to Wheeling, in the latter state.

It was held that the act of Virginia conferred on the Hempfield company such rights and privileges as to make it a Virginia corporation. It is said no particular or precise form of words is necessary to the creation of a corporation, but it may result from implication and intendment.

It is laid down in the text-books that no particular form of words is essential to create or confer corporate power. Any language, clearly manifesting the legislative intent, whether in general terms or by special enactment is sufficient. Angel & Ames on Corp.

It is also now well settled, that the lease of the franchises and property of one railroad corporation by another in Ohio does not confer on the lessee powers not possessed by the lessor.

This question was directly before the supreme court in *Campbell v. M. & C. R. R. Co.* 23 Ohio St. 168. There the M. & C. R. R. Co., which had been constructed under a special charter granted in 1845, had, under section twenty-four of the general corporation law of May 1, 1852 (which is the same law under which the present lease was made), purchased the Scioto and Hocking Valley Railroad, which had been constructed under the law of 1848. The vendee claimed the right to operate the road under its own charter, and not under the charter of the vendor.

The question before the court was, whether the purchased road was governed, as to rates for transportation, by the law under which it was built, the Act of 1848, or by the law governing the M. & C. R. R.

The twenty-fourth section provides for *leasing* as well as *purchasing*, and the same rules must be applicable to both. It is said: "As the power of the purchasing company to receive tolls, as conferred by its own charter, is limited to roads constructed under its charter, it must be inferred that the legislature intended the purchasing company to succeed to the powers and privileges of the vending company, and to none other. . . . That by a sale of the road no greater rights therein can pass to the vendee than were owned by the vendor."

The same is equally true as between lessor and lessee under the same statute.

This question, as between lessor and lessee, was decided in *The Penn. R. R. Co. v. Sly*, 65 Penn. St. 205, where it was held, that the Pennsylvania R. R. Co. leasing the road of the Philadelphia and Erie Railroad Co., with all their rights, powers, and privileges, was not subject to the charges fixed by its own charter, but to the regulation in the charter of its lessors. It is said: "By a lease a corporation as well as a natural person would succeed to all the rights and be subject to all the limitations imposed on the lessor," and that "the lessee is the assignee, for a term or period, of the lessor, and is his bailiff to hold possession for him." "The legislature, by authorizing another corporation to take such lease, have, by necessary implication, conferred them."

Both reason and authority establish the proposition that the vendor or lessee of a railroad derives all its powers and franchises to operate the road from the charter and legislative provisions conferred on the vendor or lessor.

The B. & O. R. R. Co. derives all its powers to lease and operate this road from the State of Ohio. Its Maryland charter was inoperative here. It can do no act as a corporation except such as the Central O. R. R. Co. was authorized to do.

From a careful analysis of the foregoing cases, the following rules are deducible :—

1. That a corporation created by the laws of a given state, as a legal entity, can have no legal existence outside of that state ; and that if the state of its creation permits or authorizes it to transact any of its corporate business outside of such state, it can only exercise such extra-territorial powers by the license or permission of other states, or under principles of comity between states.

2. That where such a corporation, deriving all its corporate power to act from the state of its creation, exercises these granted powers in other states, it is conclusively presumed to be a citizen of the state of its creation for the purposes of determining the jurisdiction of the United States.

3. But where a corporation, as for instance a railroad company, created by the separate but concurrent acts of two or more states, and by each is authorized to construct a road in each state, making together one continuous line of road, all operated by one corporation, with one board of officers, and one place of business in one of such states ; it is nevertheless a citizen of each of the states granting it such powers, and in which it may be served.

4. So, where existing corporations of different states, owning and operating roads in their respective states, are authorized by their respective states to consolidate and form one company, the latter takes the place of each original company, and is, as to that part of the road and business in any one of the states, a citizen of that state, whatever may be its *status* in the other state or states.

That where the matter in controversy is the result of the exercise of its franchises in any one of such states, it is an inhabitant and citizen of that state if by the law of that state it can be served there.

5. Where a corporation originally created by one state, with authority to construct and operate a road therein, is authorized by another state to extend its road through the latter state, or to purchase or lease such a road already constructed, it thereby becomes a corporation of such latter state, as to all exercise of corporate powers therein. Its powers and franchises are measured by the laws of the state wherein it exercises its functions, and not by those of the state of its original creation.

6. Apply these principles to the case at bar. The lessee succeeds only to the powers and franchises of the lessor, and is subject to the same liabilities. All these are derived from the laws governing the Central Ohio Railroad Company as reorganized. By the lease they were transferred to the Baltimore and Ohio Railroad Company. It was thus clothed with authority to own and operate a road in Ohio. It conferred on a corporation, originally created by the State of Maryland, the right to be a corporation in Ohio.

In legal effect, it was an authority to an existing foreign corporation to become an Ohio corporation, and enjoy the corporate powers conferred on the Central Ohio Railroad Company.

It was a legislative authority for a foreign corporation to become an Ohio corporation by lease or purchase from a domestic corporation its charter and property, with all its powers, immunities, and privileges. The lessee became the bailiffs of the lessor for part of the term of the lessor, and therefore stands in his stead. Co. Lit. 239 *b*, note 2.

The legislature adopts a corporation of another state, so far as to permit it to take the place of one created by Ohio law. Instead of requiring the stockholders of the Maryland corporation to take out a certificate and become a *de jure* corporation under our statute, it permits a corporation already formed to dispense with this step in the creation of a domestic corporation to become such under its existing name.

It is claimed that the case of *Ohio ex rel. v. Sherman*, 22 Ohio St. 411, is in conflict with the conclusion here reached, but a careful examination of the issue there presented will show that such is not the fact.

There the question was by what authority certain persons were assuming to act as directors of the Pittsburg, Ft. Wayne, and Chicago *Railway* Company, which was the owner of and operating a road through the state. That company was the vendee or grantee of the road and franchises of the Pittsburg, Ft. Wayne, and Chicago *Railroad* Company, which had been formed by the consolidation of distinct companies and roads existing by the laws of Pennsylvania, Ohio, Indiana, and Illinois. The road, while owned by the consolidated company, was sold by order of court, and passed to the Pittsburg, Ft. Wayne, and Chicago *Railway* Company.

The inquiry was based on the expressed assumption that the consolidated company was an Ohio corporation, and the real question was, did the conveyance pass to the railway company its right to be an Ohio corporation? The court held that this deed of conveyance, made under the Act of 1863 to this Pennsylvania corporation, did not transfer the right of the Pittsburg, Ft. Wayne, and Chicago Railroad Company, an Ohio corporation, to be an Ohio corporation, because the law of 1863 did not provide for the individual liability of its members.

But for this it is implied, though not expressed, that this is the only reason why it is not a *legal* corporation of Ohio. The whole reasoning of the court rests upon this ground. It is held that the transfer of the franchises to be a corporation under the Ohio law was in legal effect a surrender of the old charter and taking out a new, similar to the grantee; but as such grant of this *new charter* could not be made, except incumbered with the individual liability imposed by the Constitution of Ohio, and as this was not done, the grantee was not a "legal Ohio corporation."

But for this constitutional provision there can scarcely be a doubt the court would have held that this transfer of the franchise and property of the Pittsburg, Ft. Wayne, and Chicago *Railroad* Company to the Pittsburg, Ft. Wayne, and Chicago *Railway* Company, under Ohio laws, made the vendee an Ohio corporation, as was held in the numerous cases cited.

There, the real question was, whether, by the deed of conveyance, under the Act of 1863, the vendees became an Ohio corporation. The answer is in the negative for the reason stated, and not because, upon com-

mon law principles, it was not competent for the legislature, in the absence of the constitutional provision, to authorize such transfer.

In the case at bar, the question of individual liability is wholly immaterial to the question at bar.

Here, the sole question is, whether the defendant, within the meaning of the Constitution of the United States, is *in fact* a citizen of Ohio.

This does not depend on individual liability clauses, or absence of them, in state constitutions, but on the meaning of the word *citizen* as found in the judiciary article of the Constitution of the United States. Upon the facts stated, there can be no doubt that, under the rules laid down in *O. & M. R. R. Co. v. Wheeler*, and in *Railway v. Whitten*, and the numerous other cases cited, the Pittsburg, Ft. Wayne, and Chicago Railway Company was in fact a citizen of each of the states through which its road runs, and from which it has derived its corporate powers within such state. And upon the question of jurisdiction of the federal courts, this corporation is in fact an inhabitant and citizen of each of such states, although, under the peculiar provisions of the Constitution of Ohio, it is not *de jure* a domestic corporation.

Again, it is said the decision of this court, in *Passenger Ass'n Co. v. Pierce*, 27 Ohio St. 155, controls this case. That case follows that of *Insurance Co. v. Morse*, 20 How. (U. S.) 455.

Both these cases turn on the validity of an act of a state requiring a foreign corporation to waive its right, as a citizen of another state, to remove a case to the federal courts.

In both, the foreign citizenship is admitted, and the right of a state to exact a waiver of such citizenship was the only point.

Here the foreign citizenship is denied, and the claim is made that it is a domestic citizen. The question of waiver does not arise upon the record in the case before us.

Again, those cases were unlike this. They were all cases of foreign corporations, exercising in other states, through courtesy or by legislative permission, the powers and franchises conferred by the state of their creation. They derived none of their corporate franchises from the state where doing business, but acted entirely under their home charters, while in this case they derive none of their powers from their home charters, but all from the state where the business is done.

But for that provision of our Constitution as to the individual liability of stockholders, there can be no doubt that the plaintiff in error became a *de jure* as well as a *de facto* domestic corporation, subject to the sovereign control of the state as fully as the lessor corporation. It assented to the legislation authorizing it to have and operate the road under its Ohio charter. By this legislation a condition was imposed that it might be sued in Ohio. It thus, to all intents, became *de facto*, if not *de jure*, an Ohio corporation — a citizen of Ohio — as fully as if the stockholders of this Maryland corporation had taken out an Ohio charter. For these reasons the judgment of the common pleas and district court should have been affirmed.

CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

[APRIL, 1877.]

ADMIRALTY. — MARITIME LIEN. — MATERIALS FURNISHED IN HOME PORT. — MORTGAGE. — REGISTRY. — NOTICE. — WAGES OF WATCHMAN. — INSURANCE, ETC.

THE JOHN T. MOORE.

1. Under the local law of Louisiana claims for materials and supplies furnished a vessel in her home port are a lien on the vessel if recorded in the proper parish. Without such registry they have no privilege or priority over subsequent mortgages recorded by authority of the act of Congress, or claims of later date recorded by authority of the state law.
2. Claims for materials and supplies furnished in the home port, even if duly recorded, are postponed to maritime liens.
3. The registry of a mortgage on a vessel, to be effectual, must be made in the custom house of her home port.
4. Where the mortgagee of a mortgage on a vessel, which was recorded in the proper custom house, had notice of a prior unrecorded mortgage, his mortgage was postponed to the unrecorded mortgage.
5. Where A. had an unrecorded mortgage on a vessel, and B. had a mortgage on the same vessel of later date, duly recorded under the act of Congress, but had actual notice of the mortgage of A., and C. had a lien by virtue of the registry of his claim under the state law, subsequent in date to the mortgages of both A. and B., but C. had no notice of the mortgage of A., and the claim of either A. or B. was sufficient to absorb all the proceeds of the sale of the vessel: *Held*, that said proceeds should be first applied to the mortgage of A.
6. The fact that a mortgage on a vessel has not been acknowledged before a notary public, or other officer authorized to take acknowledgment of deeds, precludes its registry, but does not render it void as against the mortgagor, nor postpone it to the recorded mortgage of a subsequent mortgagee who had notice of such unrecorded mortgage.
7. The wages of a watchman employed on a vessel while lying-up in port are not a maritime lien.
8. There is no maritime lien for the premium due on a policy of insurance taken on a vessel by her owners.

THE judge of the United States district court, in which this cause was pending, having been of counsel for one of the parties, the cause was transferred into this court by virtue of the provisions of section 601 Revised Statutes.

The steamboat John T. Moore, whose home port was New Orleans, was libelled in the United States district court for the District of Louisiana, by A. M. Simonds and others, was seized and sold, and the proceeds of sale, amounting to \$24,000, paid into the registry of the court.

The case was referred to J. Ward Gurley as master, to report a tableau of distribution of the proceeds of the sale of the boat. He made a report by which he allowed as mariner's wages the sum of \$3,150.97, and as costs \$2,190.15, leaving a balance of \$18,658.88.

The master then reported that there was due to various persons who had furnished supplies, materials, and repairs to the steamer in her home

port, New Orleans, the sum of \$32,251.45, which was more than sufficient to absorb the sum remaining in the registry of the court after the payment of the mariner's wages and costs.

He reported these claims as a first lien next after the costs and mariner's wages upon the fund remaining in the registry.

Swift's Iron & Steel Works of Cincinnati, Ohio, and Dennis Long of Louisville, Kentucky, claimed the said residue of the proceeds of the sale, by virtue of a mortgage executed to them jointly upon the steamer, dated January 27, 1871, and recorded in the custom house at Cincinnati on February 8, 1871, whereby the sum of \$21,902.98 was secured to Swift's Iron & Steel Works, and the sum of \$9,206.52 was secured to Dennis Long. These debts were contracted for work done and materials supplied in the construction of the boat.

The commercial firm of John T. Moore & Co. of New Orleans claimed to be first paid out of the fund remaining in the registry of the court next after the payment of seamen's wages and costs, by virtue of a mortgage upon the boat, executed to secure to them the sum of \$14,669.22, dated January 3, 1872, and recorded in the United States custom house at New Orleans on January 4, 1872.

The commercial firm of W. G. Coyle & Co. of New Orleans claimed to be paid out of said proceeds so remaining in the registry, by virtue of a claim for \$4,032.73 for supplies furnished said boat in her home port, and recorded in the office of the recorder of mortgages for the parish of Orleans on January 9, 1874.

Exceptions were taken to the report of the master by the several claimants of the fund, and upon these exceptions the cause was heard.

Mr. *M. M. Cohen* appeared for certain mariners whose wages had been rejected by the master.

Mr. *B. Egan*, for the furnishers of materials, supplies, and repairs.

Mr. *R. De Gray*, for Swift's Iron & Steel Works and Dennis Long.

Mr. *C. B. Singleton*, for John T. Moore & Co.

Mr. *James McConnell*, for W. G. Coyle & Co.

WOODS, Circuit Judge. It is conceded that the \$24,000, the proceeds of the sale of the John T. Moore, is first subject to the payment of the costs and seamen's wages, amounting as reported by the master to the sum of \$5,341.12. The residue \$18,658.88 is insufficient to pay all the claims preferred against it. It therefore becomes necessary to decide what claims are entitled to precedence.

The first contest is between the claims for supplies, materials, and repairs furnished the boat in her home port, and the mortgages (above mentioned) to Swift's Iron & Steel Works and Dennis Long, and to John T. Moore & Co., and the recorded claims of W. G. Coyle & Co.

The claims for materials and supplies furnished, and repairs done in the home port, cannot take precedence over the mortgage of John T. Moore & Co., and the recorded claims of Wm. G. Coyle & Co., for the supplies, &c., were furnished in the home port of the boat, and the claims therefor were not recorded under the state law so as to acquire a lien as against third persons.

By article 3237, Revised Civil Code, debts due to creditors for supplies, labor, repairing, victuals, armament, and equipment are privileged on the

price of ships and other vessels. But by article 3274 no privilege shall have effect against third persons unless recorded in the manner required by law in the parish where the property to be affected is situated.

The claims under consideration were never recorded, and, therefore, can have no effect as privileged claims over those creditors who have liens either by the maritime law, or who have liens by the fact that their claims have been recorded under either the laws of the United States or the State of Louisiana. *The Lottawanna*, 21 Wall. 558.

In fact it seems to be held in the case of the *Lottawanna* that such claims have no lien at all unless recorded. Even if recorded they must be postponed to the maritime lien.

The mortgage claim of John T. Moore & Co., which was duly recorded according to law in the office of the collector of customs at New Orleans, will, with interest, be sufficient to absorb the entire fund remaining in the registry for distribution. As John T. Moore & Co. are entitled to priority over the claims for materials, supplies, and labor furnished in the home port, and not recorded as required by the state law, these claims, represented by Amanda M. F. Simonds, original libellant, and certain intervenors, may be considered as out of the case. As the mortgage to John T. Moore & Co. was recorded long before the claim of W. G. Coyle & Co. was filed for record in the mortgage office of the parish of Orleans, the latter claim may also be considered as out of the case.

The next contention is between the mortgage claims of Swift's Iron & Steel Works and Dennis Long on the one hand, and the mortgage of John T. Moore & Co. on the other.

As already seen, the mortgage to Swift's Iron & Steel Works and to Long was recorded in the office of the United States collector of customs at Cincinnati, on February 28, 1871. The mortgage to John T. Moore & Co. was recorded in the office of the United States collector of customs in New Orleans, the home port of the vessel, on January 4, 1872. So far as priority of record is concerned the mortgage to Swift's Iron & Steel Works and Long has the advantage.

But in reply to this it is claimed by John T. Moore & Co. that as their mortgage was recorded in the custom house at the home port of the boat, and the other was not, their mortgage is the better one. This position is sustained by the act of Congress, which declares that "no bill of sale, mortgage, hypothecation, or conveyance of any vessel or any part of any vessel of the United States shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance is recorded in the office of the collector of customs where such vessel is registered or enrolled." U. S. Revised Statutes, sec. 4192.

And in the case of *White's Boat v. Aldrich*, 7 Wall. 646, the supreme court in construing this law declared that "the home port of the vessel is the port in the office of whose collector the bill of sale, mortgage, &c., should be recorded."

So that it seems that the recording of the mortgage to Swift's Iron & Steel Works and Long, in the office of the collector of customs at Cincinnati, which was not the home port of the boat, was ineffectual as a record, and, so far as the record of these contending mortgages is concerned, that

of John T. Moore & Co., which was recorded in the proper office, has the advantage.

But Swift's Iron & Steel Works and Dennis Long reply to this that conceding that the mortgage to John T. Moore & Co. has the advantage in registry, yet their mortgage is valid even if it had never been recorded as against the mortgagor and against persons having actual notice thereof, and that John T. Moore & Co. had actual notice of the mortgage to Swift's Iron & Steel Works and to Long before the execution or registry of the mortgage to them.

An examination of the record upon the question of notice satisfies me that the decided preponderance of proof is in favor of the proposition that John T. Moore & Co. had notice of the mortgage to Swift's Iron & Steel Works and Long, before they took their mortgage from the owners of the John T. Moore.

Under the terms of statute and by the decisions of the courts actual notice is equivalent to notice by registry. *Patterson v. De La Roude*, 8 Wall. 292; *Mills v. Smith*, Ib. 27; *Cordova v. Hood*, 17 Ib. 1; *King v. The Young Men's Association*, 1 Woods, 386; *Planters' Bank of Georgia v. Allard*, 8 Mart. New Series, 136; *Bell v. Haw*, Ib. 243; *Rachal v. Normand*, 6 Rob. 88; *Swan v. Moore*, 14 La. An. 833; *Smith v. Lambeth*, 15 Ib. 566.

As, therefore, John T. Moore & Co. had actual notice, before the execution of the mortgage to them, of the existence of the mortgage to Swift's Iron & Steel Works and to Long, their mortgage must be postponed to the latter one.

But counsel for John T. Moore & Co. claim that the mortgage to Swift's Iron & Steel Works and Long was not acknowledged before a notary public, or other officer authorized to take acknowledgment of deeds, and that the law (Rev. Stat. sec. 4193) having declared that "no bill of sale, mortgage, hypothecation, &c., of any boat shall be recovered" unless so acknowledged, the said mortgage is ineffectual to postpone the claim of John T. Moore & Co., even though they had notice of the same.

I do not think this position can be defended. The law prescribes no formalities for the execution of a mortgage on a vessel so as to bind the mortgagor, or to postpone those having actual notice. This mortgage was for a debt contracted by her owners in the building of the vessel. The debt secured by it is confessedly just, the mortgage to secure it was executed by the owners of the boat in the presence of witnesses, and the contesting creditors, John T. Moore & Co., had notice of it. In my judgment it is binding on the mortgagors and those having notice of it without any registry. The acknowledgment before a notary is only necessary to secure registry. If the mortgagor is content to stand upon his mortgage without registry he can do so, and his mortgage is good against the mortgagor and all having actual notice. Until it is declared by law that a mortgage not acknowledged before a notary or other officer shall be void, a mortgage without such acknowledgment must be held good against the mortgagor, and those having notice.

By all the authorities, so far as the binding effect of the mortgage is concerned, subsequent incumbrancers with notice are placed on the same footing as the mortgagors themselves.

In my judgment, therefore, the mortgage to Swift's Iron & Steel Works and Dennis Long is entitled to precedence over the mortgage to John T. Moore & Co.

This disposes of the main controversy in the case. The point decided is this: John T. Moore & Co. have a mortgage on the vessel sufficient in amount to absorb the fund remaining in the registry of the court. This mortgage has precedence over the unrecorded claims for materials and supplies furnished in the home port and over the recorded claims for materials and supplies of Wm. G. Coyle & Co. If there were no other claims in the case, John T. Moore & Co. would be entitled to the entire fund remaining in the registry of the court. But Swift's Iron & Steel Works and Dennis Long have a mortgage ineffectually recorded, and, therefore, in effect, not recorded at all, which is older than the mortgage of John T. Moore & Co., and of which John T. Moore & Co. had notice before the date of their own mortgage.

This fact of notice gives the mortgage to Swift's Iron & Steel Works and Long precedence over the mortgage of John T. Moore & Co., and entitles it to priority of payment over all the claims; even though, as between the mortgage to Swift's Iron & Steel Works and Long, and claims inferior to the mortgage of John T. Moore & Co., the latter would be entitled to priority if the mortgage of John T. Moore & Co. were out of the case. *Brazee v. The Lancaster Bank*, 14 Ohio, 318; *Holliday v. Franklin Bank of Columbus*, 16 Ohio, 533.

Exception has been taken to the disallowance by the master of the claims of certain watchmen. The wages of these watchmen were earned, as appears from the report of the master, while the vessel was lying-up. These wages do not therefore constitute an admiralty lien, and the master was right in rejecting their claims as liens upon the vessel. *Phillips v. The Scattergood*, 1 Gilpin, 17.

Exception is also taken to the report of the master because he rejected claims of certain insurance companies for premiums on certain policies of insurance taken on the John T. Moore, by her owners. I know of no law which gives a lien upon a vessel for the premium for an insurance taken on her by her owners for their own benefit. It is a contract with the owner for his own benefit. It does not aid the vessel. In case of loss, the maritime liens upon the vessel are displaced and do not follow the insurance money. The money goes to the owner for his own benefit, and not to the lien-holder who may insure his own interest. *Thayer v. Goodale*, 4 La. 222; *Steele v. Franklin Fire Ins. Co.* 17 Penn. St. 290; *Turner v. Stetts*, 28 Ala. 420; *White v. Brown*, 2 Cushing, 412; *Stillwell v. Staples*, 19 N. Y. 401; *Stark v. Brown*, 7 La. An. 342. The master was right, therefore, in deciding that the claims of the insurance company for premiums were no lien upon the vessel.

Let a decree be entered in accordance with the views above expressed.

SUPERIOR COURT OF NEW HAMPSHIRE.

(To appear in 57 N. H.)

CRIMINAL LAW. — EVIDENCE. — CHARACTER OF ACCUSED. — TENDENCY TO COMMIT CRIME CHARGED. — EVIDENCE OF OTHER CRIMINAL ACTS COMMITTED BY ACCUSED.

STATE v. LAPAGE.

The prosecution cannot attack the character of the prisoner unless he first puts that in issue by offering evidence of his good character.

The prosecution cannot show the defendant's bad character by showing particular acts.

The prosecution cannot show in the prisoner a tendency or disposition to commit the crime with which he is charged.

The prosecution cannot give in evidence other criminal acts of the prisoner, unless they are so connected by circumstances with the particular crime in issue as that the proof of one fact with its circumstances has some bearing upon the issue on trial other than such as is expressed in the foregoing three propositions.

INDICTMENT, charging the respondent with the murder of Josie A. Langmaid, who was killed October 4, 1875, about nine o'clock in the morning, while passing over the Academy road, in Pembroke, on her way to school. Her head was severed from her body and removed a distance of a quarter of a mile. Another part of her body, including one half or two thirds of the vagina, was cut out and carried away, and was never recovered. No *post-mortem* examination of the body was made, with a view to ascertaining whether the victim had been violated.

The government claimed that the murder was committed "in perpetrating or attempting to perpetrate rape."

As tending to show that the prisoner had an intent to commit such a crime, and that he was making antecedent preparations therefor, the state was permitted to show, by one Clarence B. Cochran, that on October 1, about half past eight o'clock in the morning, as he was passing along the Academy road on his way to school, when he arrived within about thirty rods of the place of the murder, he saw a man jump into the bushes on the side of the road. He testified: "I only saw him pass into the bushes. He passed into the bushes, springing, as if in haste." He did not recognize the man.

Adin G. Fowler was permitted to testify to conversations with the respondent, on September 24, 25, and 26, as follows: I was to work out in front of the house on that night [September 24] sorting potatoes. Mr. Lapage came out and took hold and helped us for a few moments; and while we were to work there my sister came home. A gentleman brought her home, and she got out of the wagon and went into the house; and Mr. Lapage wanted to know who that was, and I told him; and he wanted to know then if she had been to Suncook. I told him no, she had been to school. Then he wanted to know which way she went to get there, and I told him, as well as I could, how to go, and pointed out toward the academy, that way (pointing), and he said that that must be

the same way that he came when he came out to Mr. Kimball's; and that was all that was said that night. . . .

The next night — Saturday night — I went to carry him part of the way home. I carried him down Buck Street as far as the house of Mr. Locke, and when we got down to Russ's corner he wanted to know then if there is where my sister went to school. I told him no, and pointed out toward the academy again, and told him two miles, or a mile and a half — I don't remember exactly, but I believe I told him a mile — "and then turn to your right and go up." And that was all that was said that night. . . .

Saturday I carried my sister on the street, and left her there at a place where she roomed. Then I went to Suncook and got Mr. Lapage, to bring him out. . . . We came down Buck Street. . . . When we went past there [the Academy road] I remember of telling him that that is the road my sister went on when she went to school.

Edward L. Mahair testified that he saw the respondent while he was at work for Mr. Fowler, threshing. While thus occupied, about a week before the murder, a young lady passed by. . . .

When the girl passed by he was threshing in the barn, and he spoke to me and asked me where that gal was going. I told him I did n't know. Then he asked me what her name was. I told him her name was Sarah Prentice. Then he wanted to know where she lived. I told him — went to the door, and showed him as near as I could. . . . Then he wanted to know who was going with her. I told him I did n't know. And that is all he said that day. . . . I was up there the next day, and was going through the barn, and he stopped me, and said, "Where did that gal go that went down by?" I told him I did n't know whether she went into Mr. Fowler's or went farther. He wanted to know who went with her. I told him I could n't tell him; I did n't know who went with her. Then he asked me who she was and where she lived, again, and I showed him; and then the next time he asked me who went with her, I told him I did n't know. He said he wondered which road she went on the most. I told him "I guess she goes on this road the most."

The witness then repeated an obscene and vulgar remark and inquiry made by the respondent concerning the girl.

Hiram Towle, and Harriet A. N. Towle, his wife, testified, in substance, that on Saturday, October second, about nine o'clock A. M., they were riding over the Academy road, and when about fifty or sixty rods from the place of the murder they met the respondent carrying a stick behind him. The stick was described as being similar in all respects (about three feet long, four-sided, about one and a quarter inches square, whittled at one end for a handle) to a stick produced in court, which had been found broken, and stained with blood, near the place of the murder.

Alversia Watson testified as follows: I live in Allenstown. Have a son and two daughters; my youngest daughter is attending school at Pembroke Academy; did not attend school last fall, but taught in Hooksett; I go over Chester turnpike to get there; she came home Friday nights, and went back Sundays; first part of term she walked; I went with her — generally went about a mile and three quarters. Saw

Lapage on that road once, in the last part of September, on Sunday ; saw him standing about a mile from my house beside the road, opposite some bushes ; my daughter was with me ; noticed nothing in his hands when I first saw him. Saw him again about half a mile farther on ; he was coming towards me ; this was two weeks before I heard of the murder ; he had something in his hand the second time I saw him ; it was a stick, or cane ; think that the stick was a newly cut stick ; think it was larger than the stick found in the woods of the murder ; had it in his right hand. The second time I saw him he was coming along behind me, about a hundred feet ; I watched him by looking behind me ; was about twelve feet away when I last saw him ; he was moving rapidly toward me, partly running ; my daughter was very much frightened, and was crying ; it was between four and five in the afternoon when I saw him the first time ; saw him next time half a mile farther on in the road, following on after me ; had been walking ; turning to look at my daughter, saw a man picking berries on top of a hill ; when I turned to look at my daughter, saw Lapage going into the bushes ; went about half a mile farther with my daughter ; sat on top of the hill till I thought my daughter had got out of hearing — about fifteen minutes, I think ; George Mack [the man who was picking berries] waited, and came home with me. The person I met with a club was Lapage, the prisoner.

Cross-examination. My daughter and I were going to Hooksett ; it was on Sunday ; it is four miles from my house to where she taught school ; went with her about two miles ; there are chestnut woods along the road ; first saw the man about a mile from home ; he was just outside of the road ; he was about fifty feet away then, standing still ; did not see him again until I had passed the place, and turned back and saw him again ; he stood still till I passed out of his sight by a turn in the road ; it was two or three minutes' walk before I got out of sight of him ; went with my daughter more than a mile ; went nearly half a mile before I saw him again ; he was coming in the road ; could have seen a man quite a little distance ; when I saw him last he was partly running towards me, and came to within a few feet of me ; saw the man picking berries there, near Lakin's shanty, a short distance away ; saw no one else but Mack's little boy ; the man with the stick went into the woods on the opposite side from where Mr. Mack was. The man I saw was not very tall, with black whiskers, tan-colored overalls, and gray mixed coat. Wore a dark hat. Next saw the man in jail ; can't tell when ; went there at the request of Mr. Hildreth ; he mentioned no name of any one at the jail, but wished me to go and see if there was any one there that I had seen before. Mr. Hildreth, Hattie Gault, and some others went to the jail with me ; Mr. Sargent asked me to go and look in every cell and see if there was any one that I had seen there ; went in, and when I saw Lapage, knew him at once by his looks and features ; did not notice Lapage's moustache when I met him in the road ; don't think his beard was as long in jail as when I saw him in the road.

Re-direct. My attention was called to some clothing at the jail, and I picked out a coat that I thought was like the one he wore. [Coat shown, and thought to be the same by witness.]

Matthias Mercy testified as follows : I know Annie Watson ; saw her

on Chester turnpike one Sunday last September; saw her about two and a half or three miles from Suncook saw-mill; was in the road when I met her; had not seen her before; said nothing to her; sat down on a rock beside the road; saw Lapage while I sat there; I knew Lapage before; he was running towards the girl; when he came up to me he faced towards me; his face was red and excited; he had been running half a mile, and more too; he never said anything to me; he looked right toward her; he slacked up a little, and then started off on a run; don't know whether he saw me or not.

Cross-examined. I had seen Lapage before I saw him in the road; saw him in his house in Potter's Block; saw him in the road on Sunday — the last Sunday in the month; saw a man and woman that day; their names were Palmer; they live in Allenstown; saw them when I was going up, and the girl when I came back; went up as far as Lakin's hill, turned, and came back; it is about two miles from Suncook to Lakin's hill; saw Lapage, as I was coming back from Lakin's, about five o'clock at night; met the Watson girl the other side of Lakin's hill; I walked about a quarter of a mile and sat down; heard Lapage running in half a minute; saw Lapage walk up the hill, and begin to run when he reached the top; this was after he passed me.

Anna A. Watson testified that she was the daughter of Mrs. A. Watson, and taught school in Hooksett last September; came home Friday nights and returned Sunday nights, usually. On Sunday night, a fortnight before Josie Langmaid was killed on Monday, she met two persons on the road; met T. Marcy on the road; she and her mother were followed by a man that Sunday; he was in the bushes, partly bent over, and she noticed he had dark whiskers. As they were going up the hill by a shanty she looked back and saw the man again, coming after her, some ways from where she first saw him, and he was on the side of the road, as near as across this room; he had a stick in his hands, travelling fast; he was walking, and he nearly overtook us. She was so frightened that she thought she would go up the hill as soon as possible, and in a few minutes she saw Mr. Mack; the man disappeared in the woods, and she did not see the man; he went into the woods again; after her mother left her she ran; she could not identify the man, she was so frightened at the time.

Julienne Rousse testified that she resided in Joliet, Canada, and was a sister of Joseph Lapage's wife, and knew him; saw him last four years ago last June, before seeing him in Concord; saw him at her home in Desier Marion.

Went to a pasture to milk cows while living at St. Beatrice, Canada, and met Lapage there; when I arrived at the pasture the cows were not there; Lapage was above in the pasture, with a buffalo robe mask on his face, a home-made faded red shirt, and pair of linen pants, with a leather belt around him, and a pine root in his hand the size of her arm, and about three feet long; he was four or five rails from her. A rail is ten feet; the place was not in sight of any house; it was seven o'clock in the morning, June, 1871; he tried to catch her; she shouted and tried to run away; after she had gone four or five rails he overtook her, caught hold of her, and she turned round and pulled the mask off of him, and rec-

ognized Lapage by his face; he then rolled his head into her skirt and tried to choke her. After he choked her she turned on her belly, and then he rubbed coarse sand into her eyes and mouth; after she was choked and lost her strength he outraged her; lost her strength and mind, and did not know when he left her; she was gone two hours before she reached the house, which was ten acres away, or about one third of a mile; he did not strike her with the stick, but committed rape upon her; after coming to she went to her home. He choked her throat with his hand, which left black marks upon her throat. The marks were upon her throat for a month, and her neck was very black where his fingers were, and for a month she had great difficulty in eating and drinking; was twenty-seven years old, and never married; Lapage was married at that time, and lived twenty-five or thirty acres from her home; saw Lapage the next day, but had no conversation with him; was living with a Mr. Marion then; had never seen or spoken to him since; he went to the United States at once.

Cross-examined. First talked of the outrage upon her to Joseph Lajeunesse and his daughter, the same day at nine o'clock, they being at Marion's house at the time. Three children of Marion, the oldest seven years old, and Lajeunesse's family, were the only ones in the house; could n't tell where the Lajeunesse family now lived, except that it was in a place called Acton; they left St. Beatrice three years next March, she thought. Next talked of the outrage with Mr. Marion and his wife, at three o'clock the same afternoon; employed no doctor for her injuries; Lapage first seized her by her throat. After she was down on the ground, he grabbed her by the back to throw her down, and attempted to commit the outrage, when she screamed, and he seized her throat. He turned her over after he choked her, and this was after the sand was put into her eyes and mouth, at which time she was sensible; but she lost her senses when he committed the outrage, and did not know when she recovered her senses, but was gone two hours before she got back to the house. She pulled the mask off so far as to see his eyes, and she knew the man before she pulled the mask from him. The mask was tied with two black strings, and she pulled it down so she saw his forehead; had a hat on when she first saw him, and when she grabbed his mask his hat fell off. He tried to murmur a few words of English, so as to disguise himself. She understood that Lapage knew that she knew him, and so tried to disguise himself by attempting to talk English. She had no talk with him, but screamed; Lapage had a farm, and worked on it, which belonged to Edward Perrault. Spoke to Edward Perrault about the outrage upon her. She asked him if Lapage was at home, and he said he was not, but had started for the States. She never said to Perrault that she did not know who it was that assaulted her, and had no conversation with him about the outrage.

To the admission of all the foregoing testimony the respondent excepted.

Hattie M. Gault testified as follows: Lived on Pembroke Street, a half mile this side of the academy, and attended that school October 4, and reached the school about 8.30 that morning; bells rung at 8.25 and 8.55 o'clock; stood in the door of the academy and saw Lapage pass the

building, and was as confident of it as she could be; he had an axe on his shoulder, and turned down the Academy road, and she watched him as far as she could see him on that road. Next saw him at the jail, and identified him as the man who passed the academy.

Concerning the foregoing evidence the court charged the jury as follows:—

“You have heard the testimony of Julianne Rousse to the effect that in June, 1871, this prisoner committed a rape upon her. In considering this evidence (if you believe the witness), you will be required to use careful discrimination of the way and manner in which it is to be applied to this case, if it is to be applied at all.

“We have admitted the evidence, not because it is *necessarily* connected with the issue which you are to try, — which is, the guilt or the innocence of the prisoner of the offence with which he is *here and now* charged, — but because it *may* have a legal bearing upon that issue in the way which I shall endeavor to explain, and to which I invite your most careful attention. It may be your duty to reject the evidence entirely, and put it out of the case, and out of your minds. It may be your duty to consider it. It is a fundamental principle of law, that evidence that a defendant committed one offence cannot be received to prove that he committed another and distinct offence. This principle we must take care not to violate. And, therefore, you are not to regard the evidence of Julianne Rousse as any proof or evidence that the prisoner killed Josie Langmaid. Therefore, unless you find from *other* evidence, entirely independent of that of Julianne Rousse, that the prisoner killed and murdered Josie Langmaid, you must reject her evidence altogether.

“The evidence is open to your consideration, if at all, only so far as it may seem to you to bear upon the *character* of the homicide of Josie Langmaid; only as it may bear upon the question whether she was murdered by the prisoner in perpetrating or attempting to perpetrate rape.

“Our statute declares that ‘All murder committed by poison, starving, torture, or other deliberate and premeditated killing, or committed in attempting to perpetrate arson, rape, robbery, or burglary, is murder of the first degree; and all murder not of the first degree is murder of the second degree.’

“‘And if the jury shall find any prisoner guilty of murder, they shall by their verdict find also whether it is of the first or second degree.’

“If you find, from other evidence in the case than that of Julianne Rousse, that the defendant killed Josie Langmaid deliberately and premeditatedly, or in perpetrating or attempting to perpetrate rape, you may and your duty is to reject her testimony altogether. But if you are not so satisfied by all the other evidence and circumstances of the case, you may consider her evidence. I need hardly say that you must be satisfied upon this point, that the prisoner is the man who committed the rape upon Julianne Rousse.

“The evidence you see, therefore, bears only upon the question of the *intention* of the prisoner in killing Josie Langmaid, and thus upon the *degree* of guilt, *i. e.* whether the offence is murder of the first or second degree.

"Now, 'the unlawful intent in a particular case may sometimes be inferred [not necessarily, but it *may* be inferred] from a similar intent proved to have existed in previous transactions.'

"The principle upon which such evidence is admitted is, that 'though the prisoner is not to be prejudiced in the eyes of the jury by the needless admission of testimony tending to prove another crime, yet, whenever the evidence which tends to prove the other crime tends also to prove this one, not merely by showing the prisoner to be a bad man, but by showing the particular bad intent to have existed in his mind at the time when he did the act complained of, it is admissible.'

"If, in this case, you find it necessary to show the commission of, or the attempt to commit, a rape upon Josie Langmaid, in order to find the prisoner guilty of murder in the first degree, and the evidence of the mutilation and concealment of the private parts of her body are not sufficient to satisfy you of that fact, then you may inquire what other motive induced him to kill her.

"Does the testimony of Julienne Rousse, or any other evidence in the case, tend to show the existence in the mind of the prisoner of a motive or passion which would render the commission of, or an attempt to commit, a rape upon Josie Langmaid more probable than it would otherwise seem to you? Does it or not tend to show that such a lustful intent existed in the heart of the prisoner at the time as would render the commission of a rape more probable? Does this evidence supply a motive for the commission of the offence?

"The crime committed upon Julienne Rousse was four years and more antecedent to the offence under consideration. Since that time a change may have taken place in his mind. There has been time for repentance, and the lustful disposition he bore then may have been eradicated. The more remote the evidence of this mental condition, the less force and weight belong to it.

"But in connection with this part of your inquiry, *i. e.* concerning the present intention, and whether a lustful disposition still remained in the prisoner's heart, you may consider the evidence of Adin G. Fowler, of the prisoner's inquiry on three different occasions concerning Fowler's sister, and where she went to school, and the road she took to get there (within a fortnight of the murder); of young Mahair concerning Sarah Prentice — the way she travelled, and the obscene remark concerning her; of Mrs. Watson, her daughter Anna, and Matthias Mercy, concerning his pursuit of Anna, about two weeks before the murder.

"And here it is proper to remark, that if the prisoner killed Josie Langmaid, it is not at all necessary that any lustful desire or any animosity toward her *in particular* should be shown, provided she became the victim of his lustful and murderous intent. If the intent to commit rape and murder upon some one else, or upon any girl whom by chance he might encounter, was consummated in an attack upon Josie Langmaid, the indictment is sustained."

No exceptions were taken to the charge.

The respondent was convicted of murder in the first degree, and sentenced to be hanged.

The respondent tendered this bill of exceptions, which was allowed;

and, in transferring the same for the consideration of the superior court, the circuit court reserved and transferred all questions as to the exercise of discretion.

Lewis W. Clark, attorney general (with whom were *W. W. Flanders* & *C. P. Sanborn*), for the state.

W. T. Norris (with whom were *S. B. Page* & *H. W. Greene*), *contra*.

CUSHING, C. J. The testimony of Fowler, Mahair, the Towles, the Watsons, and Mercy, was, I think, properly admitted. It all tended to show that the prisoner, about the time of the murder, was frequenting that neighborhood with a view to the commission of the crime of rape upon the person of some one of the young females whom he knew to have occasion to pass over that road. The obscene and filthy language he is described as using, in connection with his inquiries about one of the young ladies, tends to show what thoughts were in his mind, and what he was meditating. The testimony of the Watsons and Mercy tends to show, not merely an attempt or design to commit the crime on the person of Miss Watson, but also to show generally, in connection with the other testimony, that he was prowling about that place for the purpose of lying in wait for any person whom he might sacrifice to his base and cruel designs. It furnishes an illustration of the doctrine which I shall attempt to illustrate and maintain. The attempt to commit one offence may be put in evidence when attended with circumstances which give it a logical connection with the fact in issue, and not otherwise.

The admission of the testimony of *Julienne Rousse* gives rise to by far the most important question in the case. That testimony tended to prove that the prisoner, about four years and a half before the trial, at a place beyond the jurisdiction of the United States, committed the crime of rape upon a person other than the deceased; and the question is, whether that bald, naked fact, being put in evidence, had any tendency to prove any matter in issue between the state and the defendant.

These questions in regard to the relevancy of particular items of testimony always depend upon the peculiar circumstances of the case, and must be solved by the application of sound judgment and common sense. It very often happens, as practical men in the profession well know, that facts which in one state of the evidence and one aspect of the case are entirely irrelevant, suddenly, by a slight change in the conditions, become of great importance. Hence the necessity, which so often happens in attempting to take written testimony, of introducing into a deposition so many facts which at first sight seem entirely irrelevant, but which may become admissible and important; hence, too, one reason why, in criminal causes, it is so important that the witnesses should testify in open court, and in the presence of the respondent, in order that all their knowledge should be available to meet all the exigencies of the trial.

It is for this reason that so many reported cases in the law of evidence are valuable, not so much in establishing principles of law, as for the illustration of those principles.

There is a great mass of cases so similar in their circumstances, and which have occurred so often, that they may be taken as evidence of the application of the common sense and cultivated reason of a great many individuals, and so come to have the force and authority of established law.

I think we may assume, in the outset, that it is not the quality of an action, as good or bad, as unlawful or lawful, as criminal or otherwise, which is to determine its relevancy. I take it to be generally true, that any act of the prisoner may be put in evidence against him, provided it has any logical and legal tendency to prove any matter which is in issue between him and the state, notwithstanding it might have an indirect bearing, which in strictness it ought not to have, upon some other matter in issue. It may be, that in some cases the danger resulting from such indirect bearing might be so great in comparison with its importance in regard to matters on which its bearing was legitimate, that it ought not to be admitted. But I think the general rule is, that no testimony which has a legitimate bearing upon any point in issue can be excluded.

I say *legitimate bearing* advisedly, because, as already suggested, although undoubtedly the relevancy of testimony is originally a matter of logic and common sense, still there are many instances in which the evidence of particular facts as bearing upon particular issues has been so often the subject of discussion in courts of law, and so often ruled upon, that the united logic of a great many judges and lawyers may be said to furnish evidence of the sense common to a great many individuals, and, therefore, the best evidence of what may be properly called *common sense*, and thus to acquire the authority of law. It is for this reason that the subject of the relevancy of testimony has become, to so great an extent, matter of precedent and authority, and that we may with entire propriety speak of its legal relevancy.

It is proper, however, in the outset, to notice what appears to me to be a fallacy in the very commencement of the able argument for the state. It says: "Under an exceptional charge, and upon other testimony than that of Julianne Rousse, the jury have answered the first question (*i. e.* Did the defendant kill the deceased?) in the affirmative." If it could be known certainly that the jury did not give any weight to the testimony excepted to in determining whether the prisoner did the act, — if it could be certainly known that the evidence of Julianne Rousse did not create in the minds of the jury a prejudice against the prisoner on all the points of his case, — the remark might be well founded. But that is just what we do not and cannot know, although what we do know of the constitution and temper of juries creates in us a very strong belief of the contrary.

In this case I understand it to be conceded by the government that the evidence is not relevant for the purpose of showing who killed the deceased, but that it is claimed to be relevant for the purpose of showing the particular act that he was engaged in doing when he committed the murder. For the purpose of showing the offence to be murder in the first degree, it is claimed to be relevant as tending to show that he committed the murder while in the act of committing rape; but as the intent is the mysterious solvent which opens the way for the admission of the testimony, it would not be relevant for the purpose of showing that he had first committed a rape, and then did the murder afterward.

Proceeding, then, to consider what has been settled in this matter, I think we may state the law in the following propositions: —

1. It is not permitted to the prosecution to attack the character of the

prisoner, unless he first puts that in issue by offering evidence of his good character

2. It is not permitted to show the defendant's bad character by showing particular acts.

3. It is not permitted to show in the prisoner a tendency or disposition to commit the crime with which he is charged.

4. It is not permitted to give in evidence other crimes of the prisoner, unless they are so connected by circumstances with the particular crime in issue as that the proof of one fact with its circumstances has some bearing upon the issue on trial other than such as is expressed in the foregoing three propositions.

It is a maxim of our law, that every man is presumed to be innocent until he is proved to be guilty. It is characteristic of the humanity of all the English speaking peoples, that you cannot blacken the character of a party who is on trial for an alleged crime. Prisoners ordinarily come before the court and the jury under manifest disadvantages. The very fact that a man is charged with a crime is sufficient to create in many minds a belief that he is guilty. It is quite inconsistent with that fairness of trial to which every man is entitled, that the jury should be prejudiced against him by any evidence except what relates to the issue: above all, should it not be permitted to blacken his character, to show that he is worthless; to lighten the sense of responsibility which rests upon the jury, by showing that he is not worthy of painstaking and care; and, in short, that the trial is what the chemists and anatomists call *experimentum in corpore vili*.

Of course, if the respondent sees fit to put his character in issue by offering evidence tending to show that it is good, it is then permitted to the prosecution to rebut this testimony by showing that it is bad; but I think the weight of authority is to the effect that this must be done by evidence, not of particular facts, but of reputation.

The law in regard to proof of intent is, I apprehend, in no particular different from the law in regard to the proof of other facts, unless it may be in the general principle that a person is ordinarily presumed to intend the natural consequences of his actions. But always the evidence will be subject to the condition, that it legally and logically tends to prove the facts in issue, whether it be the intent or any other fact.

The foregoing positions are illustrated, and I think established, by the following citations:—

"Where a defendant has voluntarily put his character in issue, and evidence for the prosecution has been introduced, it has been said the examination may be extended to particular facts, — though this has lately been denied by courts of high respectability; and certainly it is very oppressive to a defendant, as well as irrelevant to the real issue, to admit in rebuttal a series of independent facts, forming such a constituent offence."

1 Wharton's Am. Crim. Law, and cases cited, § 637.

"While, however, bad character cannot be put in issue by the prosecution, it is permitted to introduce evidence of prior misconduct, where it is relevant either to prior malice towards an individual, or guilty knowledge." Wharton, § 639, and cases cited.

"But in other criminal cases the prosecutor cannot enter into the de-

fendant's character, unless the defendant enable him to do so by calling witnesses in support of it, — and even then the prosecutor cannot examine into particular facts, the general character of the defendant not being put in issue, but coming in collaterally." Buller's *Nisi Prius*, 296.

"But it is not competent for the government to give in proof the bad character of the defendant, unless he first opens that line of inquiry by evidence of good character." *Com. v. Webster*, 5 Cush. 325.

It will be seen that these authorities support not only the first proposition above stated, but also the others.

I also cite the following authorities in support of the other propositions, which, it seems to me, need no further support: —

"It is here, however, that the fundamental distinction begins; for while particular acts may be proved to show malice or *scienter*, it is inadmissible to prove, either in this or any other way, that the defendant had a tendency to the crime charged. Thus, in England, it has been held that on the trial of a person charged with an unnatural crime, it was not permitted to prove that the defendant had admitted that he had a tendency to such practices; and so, on an indictment against an overseer on a plantation for the murder of a slave, evidence as to the prisoner's general habits as to punishing other slaves is not admissible for the prosecution." 1 Wharton's Am. Crim. Law, § 640, and cases cited.

"So, proof of a distinct murder, committed by the defendant at a different time, or of some other felony or transaction committed upon or against a different person and at a different time, in which the defendant participated, cannot be admitted until proof has been given establishing or tending to establish the offence with which he is charged, and showing some connection between the different transactions, — or such facts or circumstances as will warrant a presumption that the latter grew out of, and was to some extent induced by, some circumstances connected with the former; in which case such circumstances connected with the former as are calculated to show the *quo animo* or motive by which the prisoner was actuated or influenced in regard to the subsequent transaction are competent and legitimate testimony." 1 Wharton's Am. Crim. Law, sec. 647, and cases cited.

In *Regina v. Oddy*, 4 Eng. L. & E. 572, it was held that "On an indictment for feloniously receiving goods, knowing them to have been stolen, it is not competent for the prosecutor, in proof of guilty knowledge of the prisoner, to give in evidence that the prisoner, at a time previous to the receipt of the prosecutor's goods, had in his possession other goods of the same sort as those mentioned in the indictment, but belonging to a different owner, and that those goods had been stolen from such owner.

"Lord Campbell, C. J. I am of opinion that the evidence objected to was as admissible under the two first counts as it was under the third; for it was evidence which went to show that the prisoner was a very bad man, and a likely person to commit such offences as those charged in the indictment. But the law of England does not allow one crime to be proved in order to raise a probability that another crime has been committed by the perpetrator of the first. The evidence which was received in the case does not tend to show that the prisoner knew that these par-

ticular goods were stolen at the time that he received them. The rule which has prevailed in the case of indictments for uttering forged bank notes, of allowing evidence to be given of the uttering other forged notes to different persons, has gone great lengths, and I should be unwilling to see that rule applied generally in the administration of the criminal law. We are all of opinion that the evidence admitted in this case with regard to the *scienter* was improperly admitted, as it afforded no ground for any legitimate inference in respect of it. The conviction, therefore, must be quashed." *Regina v. Oddy*, 4 Eng. L. & Eq. 574.

In *Schaffner v. Commonwealth*, 72 Pa. St. (13 Am. Rep.) the prisoner was indicted for the murder of his wife by poison. There was evidence of his criminal intimacy with the wife of S., on whose life was an insurance, the proceeds of which, on his death, the defendant had tried to procure. Held, that evidence that S. died with the same symptoms as the defendant's wife, and had been attended by the defendant, was inadmissible.

Agnew, J., in his opinion, said: "It is a general rule, that a distinct crime, unconnected with that laid in the indictment, cannot be given in evidence against the prisoner. It is not proper to raise a presumption of guilt, on the ground that, having committed one crime, the depravity it exhibits makes it likely he would commit another. Logically, the commission of an independent offence is not proof, in itself, of the commission of another crime; yet it cannot be said to be without influence on the mind, for certainly, if one be shown to be guilty of another crime equally heinous, it will prompt a more ready belief that he might have committed the one with which he is charged. It therefore predisposes the mind of the juror to believe the prisoner guilty. To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish; or, it must be necessary to identify the person of the actor by a connection which shows that he who committed the one must have done the other. Without this obvious connection, it is not only unjust to the prisoner to compel him to acquit himself of two offences instead of one, but it is detrimental to justice to burden a trial with multiplied issues that tend to confuse and mislead the jury. The most guilty criminal may be innocent of other offences charged against him, of which, if fairly tried, he might acquit himself. From the nature and prejudicial character of such evidence it is obvious it should not be received, unless the mind plainly perceives that the commission of the one tends, by a visible connection, to prove the commission of the other by the prisoner. If the evidence be so dubious that the judge does not clearly perceive the connection, the benefit of the doubt should be given to the prisoner, instead of suffering the minds of the jurors to be prejudiced by an independent fact carrying with it no proper evidence of the particular guilt." *Schaffner v. Commonwealth*, 13 Am. R. 651.

"It is, therefore, not competent for the prosecutor to give evidence of facts tending to prove another distinct offence for the purpose of raising an inference that the prisoner has committed the crime in question; nor is it competent to show that he has a tendency to commit the offence with which he is charged. Thus, on a prosecution for an infamous of-

fence, an admission by the prisoner that he had committed such an offence at another time was held to have been properly rejected. *Rex v. Cole*, cited in 1 Phillipps on Ev. 499 (8th ed.)." *State v. Renton*, 15 N. H. 174.

The case of *People v. Corbin*, 56 N. Y. 363, well illustrates the practical application of this doctrine. The indictment was for forging the indorsement of one Van Amburgh on a promissory note. The defence was, that the prisoner was authorized to sign Van Amburgh's name. The prisoner had had such authority, but the prosecution attempted to show that the authority had been revoked. The question of the prisoner's guilt or innocence depended upon the inquiry whether the prisoner honestly believed that he was authorized to make the indorsement, or whether he knew that the authority had been revoked, and signed Van Amburgh's name with criminal intent. To establish such intent, evidence was offered tending to show his acknowledgment that he had made a similar unauthorized use of the name of his father-in-law on other notes. The county judge charged the jury as follows: "While the proof that he has been guilty of other forgeries is not evidence upon which you are to convict him of this forgery, yet the proof of other forgeries in connection with this, so far as they are in the case, you have the right to consider, in determining what his intentions were at the time this paper was made and uttered. So far, you may consider all that character of evidence in the case, in determining the intent at the time this paper was made and uttered." The judge also, in his charge, said: "The fact that the defendant is guilty of other forgeries is no evidence to prove that he committed this forgery. So far as his admissions to Ganoung concede the commission of forgeries against Ganoung, they may be considered by you in determining what was his intent at the time this note was made and uttered."

The verdict was set aside, and a new trial granted.

Rapallo, J., in delivering the judgment of the court, said: "The cases in which offences other than those charged in the indictment may be proved, for the purpose of showing guilty knowledge or intent, are very few; and this, we think, is not one of them. The fact that the prisoner made an unauthorized use of the name of Ganoung, if established, shows that he was morally capable of committing the same offence against Van Amburgh, but does not legitimately tend to show that he did so, or that he knew and understood that Van Amburgh's authority had been withdrawn, or that the signature in question had been made with criminal intent." *People v. Corbin*, 15 Am. R. 429.

The cases which have been cited by counsel for the government afford full illustration of the principles laid down in what has been said before.

It is proper, however, to remark what seems to me to be a fallacious use of the word *intent*. Ordinarily, intent is, I think, an inference of law from acts proved. The maxim is, that every man must be taken to intend the natural consequences of his acts; and if he knowingly and voluntarily does an act which is in violation of law, he is held to have intended to violate the law. This I think would be true, whether he did or did not know that the act was unlawful. Thus, if a man should knowingly and voluntarily utter a forged bank note, or a counterfeit coin,

he would be held guilty whether he did or did not know that the act was unlawful.

The cases cited by counsel for the government admit of being classified into several distinct groups.

In the first place is the class of cases in which other offences are shown for the purpose of proving guilty knowledge. To this class belong those cases in which, in the trial of indictments for uttering forged bank notes, or counterfeit coin, the proof of other offences of the same kind is admitted. It might well happen that a person might have in his possession a single counterfeit bill or coin without knowing it to be such; but he would be much less likely to do so twice, and every repetition of such an act would increase the probability that he knew that the bills or coins were counterfeit. If he did know it, the guilty intent would be an implication of law, and not an inference of fact. To this class belongs the case of *Reg. v. Roebuck*, cited in the brief.

Another class of cases consists of those in which it becomes necessary to show that the act for which the prisoner was indicted was not accidental, — *e. g.* where the prisoner had shot the same person twice within a short time, or where the same person had fired a rick of grain twice, or where several deaths by poison had taken place in the same family, or where children of the same mother had mysteriously died. In such cases it might well happen that a man should shoot another accidentally; but that he should do it twice within a short time would be very unlikely. So, it might easily happen that a man using a gun might fire a rick of barley once by accident; but that he should do it several times in succession would be very improbable.

So, a person might die of accidental poisoning; but that several persons should so die in the same family at different times would be very unlikely.

So, that a child should be suffocated in bed by its mother might happen once; but several similar deaths in the same family could not reasonably be accounted for as accidents.

So, in the case of embezzlement effected by means of false entries, a single false entry might be accidentally made; but the probability of accident would diminish at least as fast as the instances increased. To this class of cases belong *Rex v. Voke*, *Reg. v. Geering*, *Reg. v. Cotton*, *Reg. v. Roder*, *Rex v. Mogg*, *Reg. v. Dossett*, *Reg. v. Bailey*, *Reg. v. Proud*, *Reg. v. Richardson*, cited in the brief for the prosecution.

There is another class of cases in which proof of the commission of one crime tends to show a motive for the commission of the crime with which the prisoner is charged.

"A. was indicted for the murder of H. It was opined that A., having malice against P., had hired H. to murder him, and that H. did so; but that H. being detected, A. had murdered H. to prevent a discovery of his (A.'s) guilt respecting the murder of P. Evidence was given of expressions of malice used by A. towards P., and it was held that the prosecutor might also give evidence to show that H. was in fact the person by whom P. had been murdered." *Rex v. Clewes*, 6 Car. & P. 221; Littledale, Har. D. 1, 1942.

"On trial of the prisoner for the murder of his wife, in the absence

of direct evidence, proof of an adulterous intercourse between the prisoner and another woman is admissible to repel the presumption of innocence arising from the conjugal relation." *State v. Watkins*, 9 Conn. 47; 2 U. S. D. 288.

So, in *Com. v. Ferrigan*, the adulterous intercourse of the defendant with the wife of the deceased tends to show a motive for the murder.

In cases of indictments for obtaining goods under false pretences, it very often happens that the respondent has been in some kind of business of which buying and selling goods on credit makes a part; and in such case the difficulty is, to draw the line between the points where legitimate business ceases and fraud begins. In such cases a single purchase of goods on credit might happen in the ordinary course of business; but if a party should make several purchases of goods at a time when he was in failing circumstances, that fact would have some tendency to show that he knew that he was in failing circumstances, and that he did not intend to pay for them, or expect that he should be able to do it. Of course the effect of such testimony would depend upon the number and amount of such purchases, the after-disposition of the goods purchased, and all the other circumstances. To this class belong the cases of *Com. v. Eastman*, *Bradley v. Obear*, and *Hovey v. Grant*.

Another class of cases consists of those in which the evidence tends to show a general plan or conspiracy, one act of which was that which is in issue. To this class belong *Mason v. The State*, and perhaps *Com. v. Turner & Shearer*.

If the indictment were for being a common seller of spirituous liquor, the charge could be proved in hardly any other way than by showing many specific acts; and conversely, if a man were proved to be a professional counterfeiter, that would be evidence tending to show his guilty intent. Of this description are *Rex v. Balls* and *Com. v. Edgerly*.

In the case of sexual crimes, as fornication and adultery, where the object is to prove that the respondent has committed the crime with a particular individual, evidence tending to show previous acts of indecent familiarity would have a tendency to prove the breaking down and removal of the safeguards of self-respect and modesty, and the gradual advance, step by step, to the crime. Proof of the actual commission of the same crime would still more strongly tend to show the removal of those safeguards, and still more to make probable the commission of the crime on trial. To this class belong *Com. v. Horton*, *Com. v. Thrasher*, *State v. Wallace*, *State v. Marvin*, *Com. v. Merriam*, and *Com. v. Lahey*.

It should also be remarked, that this being a matter of judgment, it is quite likely that courts would not always agree, and that some courts might see a logical connection where others could not. But however extreme the case may be, I think it will be found that the courts have always professed to put the admission of the testimony on the ground that there was some logical connection between the crime proposed to be proved other than the tendency to commit one crime as manifested by the tendency to commit the other.

In the case under consideration, I cannot see any such logical connection, between the commission of the rape upon Julianne Rousse and the murder of Josephine Langmaid, as the law requires. I am unable to see

any connection by which from the first crime can be inferred that the respondent was attempting the commission of a rape when he committed the murder, if he did it, other than such inference as I understand the law expressly to exclude. Proof of the first crime would show that the respondent was a very bad man, — would perhaps show a tendency or disposition to commit that particular crime ; but it would go no farther, and in fact would amount to little more than an attack upon the respondent's character, which is inadmissible unless he puts it in issue, and an attack upon his character by showing particular acts, which is also inadmissible.

There is another consideration which makes necessary the extremest caution in the admission of this kind of testimony, and that is, the hardship which would be imposed upon the respondent by raising such collateral issues, and the great complication which might be introduced into the trial. I do not by any means intend to assert that this consideration is conclusive. I do not see how, if the collateral fact has a legal tendency, on the principles I have stated, to prove the fact in issue, it can be excluded.

It seems to me clear, that if the evidence of the rape of Julienne Rousse were admissible, it would be equally admissible to prove the commission of any other similar offence, and that the government would not be confined to direct evidence of the fact.

We learn from the newspapers of the day that there is a vehement suspicion that the same person who murdered Josephine Langmaid murdered Miss Ball at St. Albans, and it would be equally admissible to try that case and show that fact as the other. The necessity of proving that fact, partly or wholly by an elaborate combination of circumstantial evidence, would not, that I can see, make it any the less admissible. It would certainly be an extreme hardship on the prisoner to compel him to enter upon such an investigation. I mention this case to illustrate the necessity of extreme caution not to admit such testimony unless there can be seen some distinct logical connection, such as the law requires, between the fact proposed to be proved and the fact in issue.

In the case of *State v. O'Brien*, 119 Mass. 342, the law in regard to the admissibility of evidence as to character is very fully and satisfactorily discussed. The distinction, that the term *character* concerns what the man is, and the term *reputation* concerns what is said of him, is kept plainly in view ; and it is clearly shown that the only legitimate mode of proving character is by showing reputation.

Now, I think a careful examination of that part of the charge which relates to this evidence will show that it really, in substance, amounted to instructing the jury that they were to find the character of the prisoner from the fact proved by Rousse, and infer from such character that he would be likely to be actuated by passion and lust. It was really instructing the jury that they might find, from a particular act proved, the prisoner's character as a man possessed by unlawful and lustful passion, and infer from that that he was actuated by such passion in his conduct to the deceased. The matter really reduces itself to attacking the prisoner's character by the proof of particular acts, which the authorities clearly show to be inadmissible.

This portion of the charge, though not expressly excepted to, is men-

tioned as showing the particular view with which the evidence excepted to was admitted.

LADD, J. "All murder committed . . . in perpetrating or attempting to perpetrate rape . . . is murder in the first degree." Gen. Stats. ch. 264, § 1. The state claimed (1) that the prisoner murdered Josie A. Langmaid; and (2) that the murder was committed in perpetrating or attempting to perpetrate upon her the crime of rape. Both these facts were put in issue by the plea of not guilty. It was for its supposed bearing on the second issue that the testimony of Julienne Rousse was admitted; and the judge who charged the jury guarded against any other application of that evidence, so far as a direction from the bench could have that effect upon the minds of the jury. The ground upon which the jury were told they might consider it, in determining whether the prisoner was perpetrating or attempting to perpetrate a rape when he committed the murder, was, that it bore upon the question of intent; and the ingenious, not to say subtle, argument of the attorney general rests wholly, as I understand it, on the same ground. He says: "If he (the prisoner) had passed counterfeit money at the time and place when and where he raped Julienne Rousse, and other counterfeit money had been found in his possession at the time and place when and where he killed Josie Langmaid; if he had got a negro boy into his possession at the former time and place with intent to send him into slavery, and had got another negro boy into his possession at the latter time and place, would there be any doubt that his intent on the former occasion would in fact be considered, by every intelligent member of the human family, as entitled to some weight on the question of his intent on the latter occasion? . . . What is there in the act, the circumstances, or the intent of kidnapping, or passing counterfeit money, that makes us feel the probative force of the proved intent of one occasion upon the question of intent four years and four months afterwards, and prevents our feeling any probative force of such evidence in the present case?" Starting, then, with the claim that this evidence was admissible upon the question of intent, it is necessary to understand just what intent is meant. Was it an intent to commit the crime of murder? Certainly not. That crime must be fully made out, as the learned judge correctly told the jury, by other and entirely independent evidence. He said: "It is a fundamental principle of law, that evidence that a defendant committed one offence cannot be received to prove that he committed another and distinct offence. This principle we must take care not to violate. And, therefore, you are not to regard the evidence of Julienne Rousse as any proof or evidence that the prisoner killed Josie Langmaid. Therefore, unless you find from *other* evidence, entirely independent of that of Julienne Rousse, that the prisoner killed and murdered Josie Langmaid, you must reject her evidence altogether." This, of course, covers all questions of intent, so far as regards the crime of murder.

Was it an intent to commit murder in the first degree? The answer to this is surely in the negative. Such a general intent could only be shown by evidence of a deliberate and premeditated killing in one of the ways pointed out by the statute, or otherwise. Besides, this question, like the other, seems to be fully answered by the charge. The jury were told

that "the evidence is open to your consideration, if at all, only so far as it may seem to you to bear upon the *character* of the homicide of Josie Langmaid; only as it may bear upon the question whether she was murdered by the prisoner in perpetrating or attempting to perpetrate rape." The intent, then, which it is claimed this evidence was admissible to establish, was an intent to perpetrate or attempt to perpetrate the crime of rape upon Josie A. Langmaid at the time he murdered her. But an intent to perpetrate rape, or to attempt the perpetration of that crime, is not what the statute requires to make the killing murder in the first degree. The most that can be said is, that intent may constitute an element in those crimes, as in most others. To meet the requirement of the statute, the act as well as the intent must be shown. The whole crime of perpetrating or attempting to perpetrate rape must be made out, and that includes all questions of intent that may be involved. Was he in the act of perpetrating or attempting to perpetrate rape at the time he did the killing? To this the state said, Yes; the prisoner, No. Here was a clear and distinct issue; just as clear and just as distinct as though there had been nothing else in the case. The state charged rape, or an attempt to commit that crime, as the basis of their claim that the verdict should be murder in the first degree. This charge they must prove, or the claim based upon it fails. The question is, How is it to be proved? What is the rule of evidence to be applied? Is evidence to be received upon the trial that would be inadmissible if the charge were rape alone? If so, upon what ground? What principle of law, or logic, or humanity, will admit evidence to prove rape when the consequence of a finding against the prisoner is death, and exclude the same evidence when the consequence is only loss of liberty? I do not know whether the argument for the state holds that a distinction in this respect should be made. Certainly, the ingenuity and industry of the attorney general have failed to point out any ground upon which evidence that would be inadmissible to prove rape upon the trial of an indictment for that crime alone, can be received to prove rape when charged on the trial of an indictment for murder in the first degree, and relied on by the state as an essential element of that offence under the statute. And I confess it is impossible for me to imagine the shadow of a reason upon which such a claim could be sustained were it put forth. What, then, is the question presented by this exception? Clearly, no other than this: Was evidence that the prisoner committed rape upon Julianne Rousse, in Canada, in 1871, legally admissible to show that he committed or attempted to commit rape upon Josie A. Langmaid, at Pembroke, in 1875? There was no question as to the defendant's physical strength and ability to commit the crime of rape. By no refinement, therefore, can *State v. Knapp*, 45 N. H. 148, be said to apply. There is no room or occasion to argue that the actual perpetration of rape upon one woman tends to show physical strength sufficient to commit the same crime upon another. No such connecting link is in the case. The simple naked question is that just stated, namely: Can evidence that he committed rape upon one woman be received as evidence from which the jury may find that he committed rape upon another? — the two events being entirely independent and distinct, — no way connected in time, or place, or circumstances; and we cannot,

in my judgment, suffer that question to be changed in form, or to be covered up and disguised by vague and general observations as to the matter of intent, however astute and plausible, without imminent danger of losing our way in a wilderness of fallacy and error. The answer to that question is to be sought for in the recognized authorities of the common law; and I must say, that if there is any break in those authorities, any want of unanimity in the answer which they give, I have failed to discover it. Doubtless some of the cases to which we have been referred run pretty near the line. But no court has yet said, to my knowledge, that the commission of one crime is legal evidence of the commission of another, when there is no connection of time, or place, or circumstance, or intent between the two, except that the commission of the first tends to show a heart capable of committing the second.

This very question was answered in the same way, as it seems to me, by the learned judge, when he said: "It is a fundamental principle of law, that evidence that a defendant committed one offence cannot be received to prove that he committed another and distinct offence."

But it is nevertheless argued on behalf of the state (if I have not wholly misapprehended the drift of the argument) that the evidence was admitted because, *as matter of fact*, its natural tendency was to produce conviction in the mind that the prisoner committed rape upon his victim at the time he took her life. The learned attorney general says: "The question of fact here is, whether, on those grounds of natural law, natural reason, and human experience, upon which such a question of fact must be decided, the intent with which the defendant assaulted Juliette Rousse is capable of affording any light on the intent with which he assaulted the deceased. . . . It will be admitted, I suppose, that every intelligent person, untrammelled by technical rules, will concur in the opinion of the circuit court. And the question being one of pure fact unmixed with law, and therefore not subject to technical rules, on what ground will any one dissent from the unanimous judgment of the rest of mankind?" And further, that unanimous judgment "is the spontaneous and irreversible judgment of every grade of intellect that has appeared, or is likely to appear, in this state of existence. It is an involuntary and unavoidable perception of the inherent and self-evident relations of conduct and intention, a mental revelation as natural as memory, and as trustworthy and unanswerable as consciousness."

I shall not undertake to deny this. If I know a man has broken into my house and stolen my goods, I am for that reason more ready to believe him guilty of breaking into my neighbor's house and committing the same crime there. We do not trust our property with a notorious thief. We cannot help suspecting a man of evil life and infamous character sooner than one who is known to be free from every taint of dishonesty or crime. We naturally recoil with fear and loathing from a known murderer, and watch his conduct as we would the motions of a beast of prey. When the community is startled by the commission of some great crime, our first search for the perpetrator is naturally directed, not among those who have hitherto lived blameless lives, but among those whose conduct has been such as to create the belief that they have the depravity of heart to do the deed. This is human nature — the teaching of human experience.

If it were the law, that everything which has a natural tendency to lead the mind towards a conclusion that a person charged with crime is guilty must be admitted in evidence against him on the trial of that charge, the argument for the state would doubtless be hard to answer. If I know a man has once been false, I cannot after that believe in his truth as I did before. If I know he has committed the crime of perjury once, I more readily believe he will commit the same awful crime again, and I cannot accord the same trust and confidence to his statements under oath that I otherwise should. Yet, does the law permit the credit of a witness to be impeached by showing individual acts of falsehood? We do not and we cannot believe a known liar the same as we believe a known man of truth. Why, then, ought not evidence showing that a witness has lied on any particular occasion to be received, in order that we may weigh the credit of his testimony by rules derived from human nature and experience, such as we naturally and instinctively apply in the other affairs of life?

Suppose the general character of one charged with crime is infamous and degraded to the last degree; that his life has been nothing but a succession of crimes of the most atrocious and revolting sort: does not the knowledge of all this inevitably carry the mind in the direction of a conclusion that he has added the particular crime for which he is being tried to the list of those that have gone before? Why, then, should not the prosecutor be permitted to show facts which tend so naturally to produce a conviction of his guilt? The answer to all these questions is plain and decisive: the law is otherwise. It is the law, that the prisoner shall be presumed innocent until his guilt is proved; it is the law, that his bad character shall not be shown by the state until he has put that matter in issue by attempting to show good character for himself; it is the law, that the credit of a witness shall not be impeached by showing specific instances of falsehood against him; and it is the law, that evidence of the commission of one crime shall not be received to show the commission of another when there is no connection between the two. Whether the law in this respect is wise or unwise, whether it accords with human reason and experience, whether it affords too great protection to the criminal or too little to the community, are not questions with which we have to do. It has been thought, that to confront a man on trial for a crime that involves no more than his liberty and property with every act of his former life, and require him to purge himself from the suspicion of guilt which may be raised by the testimony of witnesses to individual instances of alleged wrong-doing, would be not only oppressive and unfair, but arbitrary and inhuman.

The rules of the common law in reference to the detection and punishment of crime, which are the growth of ages, and embody the practical wisdom and experience of many great and learned men, carry upon every page unmistakable evidence that they were devised as well to shield the innocent as to punish the guilty. Throughout they recognize the fact that innocent men may be accused of crime. A highly wrought condition of the public mind, the popular horror and indignation that arise upon the commission of a dreadful crime, are not favorable to the calm and dispassionate application of a just and humane law. They do not always leave the vision clear. But popular clamor, however loud, cannot be permitted

to invade this place without imperilling the most sacred rights of the innocent as well as the guilty. The rule which we apply in the trial of a wretch who has ravished and killed an innocent girl, and then, with the incarnate spirit of a fiend, torn and cut and mutilated her body in a way that causes the blood to curdle and the heart to rise in almost uncontrollable rage, is the same rule which we must apply in the trial of the innocent victim of a wicked and audacious conspiracy, or of one who, without fault, has become entangled in a mesh of circumstances which threaten an innocent life.

I think the admission of the testimony of Julianne Rousse was error, because it violated the fundamental principle of law, that evidence that a defendant committed one offence cannot be received to prove that he committed another and distinct offence. The other exceptions, I think, should be overruled, for the reasons given by the attorney general in his brief.

SMITH, J. The jury were instructed that the testimony of Julianne Rousse should be considered by them only so far as it might seem to them to bear upon the question whether Josie Langmaid was murdered by the prisoner (if they should find from other evidence that he did murder her) in perpetrating or attempting to perpetrate rape. The question at once arises whether her evidence had any legal tendency to prove the character of the homicide.

It was correctly stated by the presiding judge at the trial to be "a fundamental principle of law, that evidence that a defendant committed one offence cannot be received to prove that he committed another and distinct offence." There are seeming exceptions to this rule, as when guilty knowledge is an ingredient of the crime, or the intent with which a particular act is done is material. These exceptions have been very clearly classified by the chief justice, and I shall not attempt to go over the same ground, except incidentally, in what I may have occasion to say. The exceptions will all be found, I think, to be governed by principles that exclude this case from their operation.

The great objection to admitting such evidence is the injustice that would be done thereby, which is very forcibly stated by Allen, J., in *Coleman v. People*, 55 N. Y. 90: "The general rule is against receiving evidence of another offence. A person cannot be convicted of one offence upon proof that he committed another, however persuasive in a moral point of view such evidence may be. It would be easier to believe a person guilty of one crime, if it was known that he had committed another of a similar character, or, indeed, of any character; but the injustice of such a rule in courts of justice is apparent. It would lead to convictions upon the particular charge made by proof of other acts in no way connected with it, and to uniting evidence of several offences to produce conviction for a single one."

It is always competent for the government to introduce evidence of any facts tending directly to show an evil intent, or from which such evil intent may be justly and reasonably inferred; but all proof in relation to transactions not intimately and directly connected with the particular accusation against the defendant, or with the evidence, or in necessary explanation of the evidence introduced in support of the charge contained

in the indictment, is irrelevant and inadmissible. *Com. v. Tuckerman*, 10 Gray, 198. In that case the rule is laid down, that such evidence should have a peculiar and intimate if not also an inseparable connection with, and tending to explain and characterize, the act in issue charged against the prisoner, and is only admissible on the question of intent.

So in *Com. v. Campbell*, 7 Allen, 542, it was held that such evidence is inadmissible where the offence charged and that offered to be proved are distinct.

In our own case of *State v. Renton*, 15 N. H. 174, it was very clearly held that it is not competent to show that the respondent had a tendency to commit the offence with which he was charged.

The charge made by the state is, that this respondent killed the deceased in perpetrating or attempting to perpetrate a rape upon her. As having some tendency to show that he committed or attempted to commit a rape upon Josie Langmaid, the state was permitted to show that four years and more previously he had committed a rape upon Julianne Rousse, in Canada. Had the testimony any such tendency? There was obviously no connection whatever between the two offences or transactions, either in the persons upon whom the crimes were committed, or in the places where or times when committed. The evidence of Julianne Rousse, at most, would only show that the respondent was depraved enough to commit the crime of rape, or that he possessed a lustful desire in his heart which he on that occasion did not hesitate to gratify by violent means.

But how does the fact that the respondent committed a rape more than four years previously, in Canada, upon another person, have any tendency to show the intent with which he killed Josie Langmaid? It is not claimed that he killed her to enable him to commit a rape: the rape preceded the killing, and the killing was done to conceal the rape.

Suppose the respondent had committed only the crime of rape upon Josie Langmaid, and then had spared her life: I think no case can be found that would authorize the state, upon the trial of an indictment against the respondent for the rape, to give in evidence the rape committed upon another person more than four years previously. No case of a more marked and distinct offence, as to time, place, victims, and circumstances, can be found. How, then, does such evidence become any more relevant when the trial is upon an indictment for killing while committing a rape?

Lord Mansfield has expressed the rule in these apt words: "When an act, in itself indifferent, becomes criminal if done with a particular intent, then the intent must be proved and found; but when the act is in itself unlawful, the proof of justification or excuse lies on the defendant; and in case of failure thereof, the law implies a criminal intent."

Thus, upon the charge of passing counterfeit money, proof that the respondent knew it was counterfeit is necessary, as showing the intent with which it was passed. Upon the charge of obtaining goods under false pretences, proof of fraudulent intent is necessary. Upon the charge of murder, the killing being proved, the malice is implied in the absence of any explanation by the prisoner of the act. In this case there was no connection whatever between the rape of Julianne Rousse in 1871, in Canada, and the murder of Josie Langmaid in New Hampshire, in 1875.

There can be no pretence that they are continuous parts of one transaction; that when the rape was committed upon Julianne Rousse, in 1871, the prisoner had any design to commit a rape upon or to murder Josie Langmaid, or any other woman, in 1875. The two acts are so wholly distinct and separate, that when the prisoner formed the design of committing a rape upon Julianne Rousse, and carried that design into effect in 1871, he did not and could not as a part of that evil design and act, or as a consequence thereof, have then premeditated the murder of Josie Langmaid, or the perpetration of rape upon her.

No point is better settled than that the state cannot give evidence of the bad character of the respondent, unless he shall first put his character in question by introducing evidence in support thereof. As the only effect of the state's introducing evidence of another rape by the respondent is that it tended to show that he possessed a disposition to commit that particular crime, a disposition which would incline him to the perpetration of rape whenever the opportunity might occur, how does such testimony differ from that of evidence as to the prisoner's bad character, before he has elected to put it in question, and that too by introducing proof of an isolated fact?

The whole answer to the position, that the evidence of Julianne Rousse was relevant to the issue tried, is, that it does not show or tend to show that the prisoner perpetrated or attempted to perpetrate a rape upon Josie Langmaid. Proof that he committed a rape in Canada, four years previously, upon Julianne Rousse shows what? Not that he then had any design or intent to perpetrate a rape four years afterwards upon another woman whom he had never seen or heard of, or in a place two hundred miles distant where he never had been; not that he had then formed a design to rape and murder women whenever he might have opportunity; not that he had ever before or since committed that crime, — but that the defendant had a disposition to commit the crime of rape four years previously. No one will pretend that evidence that the prisoner had committed another murder, in Canada, or Texas, or Europe, could be shown on this trial. One cannot be convicted of murder, by showing that he has at some time and somewhere else committed another murder; or of larceny, by showing that he has committed the crime before, and therefore has an evil disposition inclining him towards that particular crime.

The trouble with the position of the state is, that it is not a question of *motive* or *intent*. Certainly, committing a rape in Canada in 1871 would not show any motive for committing a rape in New Hampshire in 1875; nor does it disclose any intent so to do. Evidence tending to prove collateral facts is admissible only when it has a natural tendency to establish the fact in controversy, or to corroborate other direct evidence in the case. *Com. v. Merriam*, 14 Pick. 518. So, in *Com. v. Ferrigan*, 44 Pa. St. 386, in a trial for murder, evidence that an adulterous intercourse between the wife of the deceased and the prisoner had existed and continued to near the time of the homicide was received, on the ground that one crime furnished a motive for the other. In *People v. Wood*, 3 Parker Crim. Cas. 681, which was a trial for murder, proof of other crimes than that alleged, but connected with it by unity of plot and design, and influenced by a single motive, was held admissible.

In *State v. Renton*, 15 N. H. 174, Gilchrist, J., very aptly remarked : "Where a person is charged with an offence, it is important to him that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment, which alone he can be expected to be prepared to answer. It is therefore not competent for the prosecutor to give evidence of facts tending to prove another distinct offence, for the purpose of raising an inference that the prisoner has committed the crime in question. Nor is it competent to show that he has a tendency to commit the offence with which he is charged. Thus, on a prosecution for an infamous offence, an admission by the prisoner that he had committed such an offence at another time was held to have been properly rejected. *Rex v. Cole*, cited 1 Ph. on Ev. 499 (8th ed.). The case of the respondent is to be tried upon its own merits. . . . It is argued that reference may be made to what was done on a former day, that this transaction may then be compared with that, and thus may acquire a certain character. But then, if found guilty, he would be so, not so much because what he did was wrongful in itself, but because his conduct on this occasion was like his conduct on some previous occasion. . . . By comparing one with the other, we establish the guilt of the respondent by arguing in a circle. But this is to be shown by proof of what he did on the present occasion."

So, in *East Kingston v. Towle*, 48 N. H. 57, which was an action against the owner of a dog alleged to have been concerned in killing sheep, Perley, C. J., said (p. 65) : "We are not acquainted with any rule of evidence which will allow the character of the dog, or the fact that he had killed or worried sheep before, to be admitted as evidence that he did the damage complained of in this suit. To show that he did this mischief, it is not competent to prove that he had done similar mischief before, any more than it would be to prove that a defendant sued for an assault and battery had beaten other men before, or the same man."

In *State v. Prescott*, 33 N. H. 212, which was an indictment for keeping a gaming-house, the allegation in the second count was confined to a single day ; and it was held that the government could not prove, for the purpose of charging the defendant on that count, that the crime was committed on more than one day, although evidence covering a longer time would be admissible for the purpose of showing what character the house had on the particular day when it was sought to prove that the offence was committed.

In *State v. Wentworth*, 37 N. H. 197, evidence that the prisoner placed on the railroad track obstructions other than those for which the indictment was found was held competent, upon the ground that the acts were so connected that they might be regarded as being the continuation of the same transaction. But the fundamental rule, that the evidence of another distinct offence could not be shown for the purpose of raising an inference that the prisoner has committed the crime with which he is charged, was distinctly recognized.

The testimony of the other witnesses excepted to is free from the objection made to that of Julianne Rousse. They all testified to facts which tended to show that the respondent was forming in his mind a plot to commit the crime of rape upon some one in the vicinity of the place of

this homicide. No lustful desire or particular animosity or malice against Josie Langmaid need be shown. She became the victim of his lustful passion, and his evil designs were consummated in the attack which deprived her of life.

But because of the admission of the testimony of Julianne Rousse, there must be
A new trial granted.

SUPREME COURT OF MAINE.

(To appear in 66 Me.)

STATUTE OF FRAUDS. — MEMORANDUM PREPARED AFTER BREACH OF CONTRACT.

BIRD v. MUNROE.

Where the defendant verbally contracted with the plaintiffs for the purchase of a quantity of ice to be afterwards delivered, and after the breach of the contract by the defendant, the parties put the contract into writing, in the terms as before agreed upon verbally, antedating it as an original contract of the date of the verbal contract first made, in an action upon the contract commenced after, but declaring upon a breach which occurred before, the writing was made, the writing is sufficient evidence of the prior verbal contract to satisfy the statute of frauds.

In such case, in view of the statute of frauds, the writing is not to be regarded as constituting the contract itself, but as merely the necessary evidence by which the contract may be proved.

Parol evidence is admissible, to show that the date of the writing was not an erroneous, but an intentional one, and that the parties intended thereby to create written evidence of the unwritten contract before made.

ASSUMPSIT, declaring on a contract substantially as stated in the following writing signed by the parties, and read in evidence by the plaintiffs:—

“Rockland, March 2, 1874.

“Memorandum contract by and between H. H. Munroe, of Thomaston, of the first part, and John Bird & Co., of Rockland, of the second part. The party of the first part agrees to pay the party of the second part four dollars per ton gross (2,240 lbs.) for five thousand tons of ice, weighed on board, price to include ice and freight to New York. The said party of the second part agrees to deliver said ice on following conditions: Shipments to begin immediately, and to continue until full amount is shipped, cash to be paid on delivery of each cargo. Vessels to be discharged with dispatch; demurrage, if any, to be paid by party of first part, and no commissions to be paid on sales.

“H. H. Munroe.

“John Bird & Co.

“Attest: Edmund A. Smith.”

The declaration averred a breach of the contract by the defendant, in ordering a stoppage of shipments after one half of the quantity contracted for had been shipped; and the plaintiffs claimed for extra expenses, by reason thereof itemized in the following account annexed to the writ:—

April 7, 1874.	To expense housing 2,500 tons of ice @ 25c.	\$625.00
	To expense breaking out & loading same,	625.00
	To expense building houses for same,	600.00
	To expense in hauling same,	250.00
	To shrinkage and waste (500 tons),	375.00
	To expenses at New York and telegrams,	125.00
		\$2,600.00

The defendant pleaded the general issue with a brief statement "that the said supposed contract set forth and declared upon in the plaintiffs' writ, as having been made between the plaintiffs and defendant, on the said 2d day of March, A. D. 1874, was not in writing, nor was there any written memorandum thereof ever made by either of the parties to this action, or by their agents, nor was there ever any delivery of the said ice, or any part thereof by the plaintiffs to defendant, nor any acceptance or reception of the same or any part thereof by the defendant; nor did the defendant ever pay to the plaintiffs anything in earnest to bind the bargain, or in part payment for said ice, and that said contract, if any such contract was ever made, was void by force of the statute of frauds.

"And that the said supposed contract in the declaration set forth, if any such was ever legally made, was, on the 24th day of March, 1874, abandoned and cancelled by the mutual consent of the parties, and all breaches thereof waived and satisfied, by the said cancellation and abandonment, and that the plaintiffs did not deliver the said ice to the defendant, but sold and delivered it to the Knickerbocker Ice Co., of New York, and received payment therefor from said Ice Co."

The evidence tended to show that after one half of the ice had been shipped, the defendant ordered further shipments on his account to cease; that none of the ice was in fact received by him; that March 24, 1874, the parties met in New York, and then and there reduced to writing the memorandum in evidence dated March 2, 1874; that the plaintiffs contracted on the same day to sell all the ice to the Knickerbocker Ice Co., the twenty-five hundred tons afloat at \$4.00 per ton, and the twenty-five hundred tons in house at \$4.25, including freights, the twenty-five cents per ton added to be paid to S. H. Allen.

On this contract was the following indorsement signed by the defendant and witnessed:—

"It is understood that the within five thousand tons (5,000) of ice is the same that was contracted for on March 2, 1874, with H. H. Munroe, and I, H. H. Munroe, hereby consent to the assignment of the same to the Knickerbocker Ice Company.

"New York, March 24, 1874."

After the foregoing and other evidence, which in the opinion sufficiently appears, was introduced, the action was made law on report, to stand for trial if maintainable upon so much of the evidence as was legally admissible, otherwise the plaintiffs to be nonsuit.

A. S. Rice & O. G. Hall, for the plaintiffs.

A. P. Gould & J. E. Moore, *contra*, contended that the allegation based upon the written contract was not supported by proof; that the

evidence of the verbal contract, such as it was, even if legally admissible, did not support the declaration, and that it was not legally admissible, because of the statute of frauds; that the memorandum in evidence was a written contract in itself, and not intended as a memorandum of a previous verbal contract; that a verbal offer subsequently reduced to writing in the form of a contract, and signed by the parties, or even by the party making it, could not be treated as a memorandum of a verbal offer or agreement; *Washington Ice Co. v. Webster*, 62 Maine, 341; that the verbal contract, if any existed, covered only one or two of the many elements of the written contract; that the contract dated March 2, and written, executed, and delivered March 24, could have no validity before the latter date; that the written contract took its force and effect from the day of its execution and delivery, and not from the day of its date; *Hall v. Cazenove*, 4 East, 477; *Joseph v. Bigelow*, 4 Cush. 82; *Jackson v. Shoonmaker*, 2 Johns. 230; that if the instrument had no validity as a sale prior to March 24, it had validity for no purpose prior to that time. *Egery v. Woodard*, 56 Maine, 45.

PETERS, J. On March 2, 1874, at Rockland, in this state, the defendant contracted verbally with the plaintiffs for the purchase of a quantity of ice, to be delivered (by immediate shipments) to the defendant in New York. On March 10, 1874, or thereabouts, the defendant, by his want of readiness to receive a portion of the ice as he had agreed to, temporarily prevented the plaintiffs from performing the contract on their part according to the preparations made by them for the purpose. On March 24, 1874, the parties, then in New York, put their previous verbal contract into writing, antedating it as an original contract made at Rockland on March 2, 1874. On the same day (March 24), by consent of the defendant, the plaintiffs sold the same ice to another party, reserving their claim against the defendant for damages sustained by them by the breach of the contract by the defendant on March 10, or about that time. This action was commenced on April 11, 1874, counting on the contract as made on March 2, and declaring for damages sustained by the breach of contract on March 10, or thereabouts, and prior to March 24, 1874. Several objections are set up against the plaintiffs' right to recover.

The first objection is, that in some respects the allegations in the writ and the written proof do not concur. But we pass this point, as any imperfection in the writ may, either with or without terms, be corrected by amendment hereafter.

Then it is claimed for the defendant that, as matter of fact, the parties intended to make a new and original contract as of March 24, by their writing made on that day and antedated March 2, and that it was not their purpose thereby to give expression and efficacy to any unwritten contract made by them before that time. But we think a jury would be well warranted in coming to a different conclusion. Undoubtedly there are circumstances tending to throw some doubt upon the idea that both parties understood that a contract was fully entered into on March 2, 1874, but that doubt is much more than overcome when all the written and oral evidence is considered together. We think the writing made on the 24th March, with the explanations as to its origin, is to be con-

sidered precisely as if the parties on that day had signed a paper dated of that date, certifying and admitting that they had on the 2d day of March made a verbal contract, and stating in exact written terms just what such verbal contract was. Parol evidence is proper to show the situation of the parties and the circumstances under which the contract was made. It explains but does not alter the terms of the contract. The defendant himself invokes it to show that, according to his view, the paper bears an erroneous date. Such evidence merely discloses in this case such facts as are part of the *res gestæ*. Benjamin on Sales, § 213; *Stoops v. Smith*, 100 Mass. 63, 66, and cases there cited.

Then, the defendant next contends that, even if the writing signed by the parties was intended by them to operate retroactively as of the first named date, as a matter of law, it cannot be permitted to have that effect and meet the requirements of the statute of frauds. The position of the defendant is, that all which took place between the parties before the 24th of March was of the nature of negotiation and proposition only; and that there was no valid contract, such as is called for by the statute of frauds, before that day; and that the action is not maintainable, because the breach of contract is alleged to have occurred before that time. The plaintiffs, on the other hand, contend that the real contract was made verbally on the 2d of March, and that the written instrument is sufficient proof to make the verbal contract a valid one as of that date (March 2), although the written proof was not made out until twenty-two days after that time. Was the valid contract, therefore, made on March 2d or March the 24th? The point raised is, whether, in view of the statute of frauds, the writing in this case shall be considered as constituting the contract itself, or at any rate any substantial portion of it, or whether it may be regarded as merely the necessary legal evidence by means of which the prior unwritten contract may be proved. In other words, is the writing the contract, or only evidence of it. We incline to the latter view.

The peculiar wording of the statute presents a strong argument for such a determination. The section reads: "No contract for the sale of any goods, wares, or merchandise, for thirty dollars or more, shall be valid, unless the purchaser accepts and receives part of the goods, or gives something in earnest to bind the bargain, or in part payment thereof, or some note or memorandum thereof is made and signed by the party to be charged thereby, or his agent." In the first place, the statute does not go to all contracts of sale, but only to those where the price is over a certain sum. Then, the requirement of the statute is in the alternative. The contract need not be evidenced by writing at all, provided "the purchaser accepts and receives a part of the goods, or gives something in earnest to bind the bargain, or in part payment thereof." If any one of these circumstances will as effectually perfect the sale as a writing would, it is not easily seen how the writing can actually constitute the contract, merely because a writing happens to exist. It could not with any correctness be said, that anything given in earnest to bind a bargain was a substantial part of the bargain itself, or anything more than a particular mode of proof. Then, it is not the contract that is required to be in writing, but only "some note or memorandum thereof." This language supposes that the verbal bargain may be first made, and a memorandum of it

given afterwards. It also implies that no set and formal agreement is called for. Chancellor Kent says, "The instrument is liberally construed without regard to forms." The briefest possible forms of a bargain have been deemed sufficient in many cases. Certain important elements of a completed contract may be omitted altogether. For instance, in this state, the consideration for the promise is not required to be expressed in writing. *Gillighan v. Boardman*, 29 Maine, 79. Again, it is provided that the note or memorandum is sufficient, if signed only by the person sought to be charged. One party may be held thereby and the other not be. There may be a mutuality of contract but not of evidence or of remedy. Still, if the writing is to be regarded in all cases as constituting the contract, in many cases there would be but one contracting party.

Another idea gives weight to the argument for the position advocated by the plaintiffs; and that is, that such a construction of the statute upholds contracts according to the intention of parties thereto, while it, at the same time, fully subserves all the purposes for which the statute was created. It must be borne in mind that verbal bargains for the sale of personal property are good at common law. Nor are they made illegal by the statute. Parties can execute them if they mutually please to do so. The object of the statute is to prevent perjury and fraud. Of course, perjury and fraud cannot be wholly prevented; but, as said by Bigelow, J. 3 Gray, 381, "A memorandum in writing will be as effectual against perjury, although signed subsequently to the making of a verbal contract, as if it had been executed at the moment when the parties consummated their agreement by word of mouth." We think it would be more so. A person would be likely to commit himself in writing with more care and caution after time to take a second thought. The *locus penitentiae* remains to him.

By no means are we to be understood as saying that all written instruments will satisfy the statute, by having the effect to make the contracts described in them valid from their first verbal inception. That must depend upon circumstances. In many, and perhaps most instances, such a version of the transaction would not agree with the actual understanding of the parties. In many cases, undoubtedly, the written instrument is *per se* the contract of the parties. In many cases, as for instance, like the antedating of the deed in *Egery v. Woodard*, 56 Maine, 45, cited by the defendant, the contract (by deed) could not take effect before delivery; the law forbids it. So a will made by parol is absolutely void. But all these classes of cases differ from the case before us.

A distinction is attempted to be set up between the meaning to be given to R. S. c. 111, § 4, where it is provided that no unwritten contract for the sale of goods "shall be valid," and that to be given to the several preceding sections, where it provided that upon certain other kinds of unwritten contracts "no action shall be maintained;" the position taken being that in the former case the contract is void, and in the other cases only voidable perhaps, or not enforceable by suit at law. But the distinction is without any essential difference, and is now so regarded by authors generally, and in most of the decided cases. All the sections referred to rest upon precisely the same policy. Exactly the same object is aimed at in all. The difference of phraseology in the different sections of

the original English statute, of which ours is a substantial copy, may perhaps be accounted for by the fact, as is generally conceded, that the authorship of the statute was the work of different hands. Although our statute (R. S. 1871, § 4) uses the words "no contract shall be valid," our previous statutes used the phrase "shall be allowed to be good;" and the change was made when the statutes were revised in 1857, without any legislative intent to make an alteration in the sense of the section. R. S. 1841, c. 136, § 4. The two sets of phrases were undoubtedly deemed to be equivalent expressions. The words of the original English section are, "Shall not be allowed to be good," meaning, it is said, not good for the purpose of sustaining an action thereon without written proof. Brown St. Frauds, §§ 115, 136, and notes to the sections. Benjamin's Sales, § 114; *Townsend v. Hargraves*, 118 Mass. 325, and cases there cited.

There are few decisions that bear directly upon the precise point which this case presents to us. From the nature of things, a state of facts involving the question would seldom exist. But we regard the case of *Townsend v. Hargraves*, above cited, as representing the principle very pointedly. It was there held that the statute of frauds affects the remedy only and not the validity of the contract; and that where there has been a completed oral contract of sale of goods, the acceptance and receipt of part of the goods by the purchaser takes the case out of the statute, although such acceptance and receipt are after the rest of the goods are destroyed by fire while in the hands of the seller or his agent. The date of the agreement rather than the date of the part acceptance was treated as the time when the contract was made; and the risk of the loss of the goods was cast upon the buyer. *Vincent v. Germond*, 11 Johns. 283, is to the same effect. We are not aware of any case where the question has been directly adjudicated adversely to these cases. *Webster v. Zielly*, 52 Barb. (N. Y.) 482, in the argument of the court, directly admits the same principle. The case of *Leather Cloth Co. v. Hieronimus*, L. R. 10 Q. B. 140, seems also to be an authority directly in point. *Thompson v. Alger*, 12 Met. 428, 435, and *Marsh v. Hyde*, 8 Gray, 331, relied on by defendant, do not, in their results, oppose the idea of the above cases, although there may be some expressions in them inconsistent therewith. Altogether another question was before the court in the latter cases.

But there are a great many cases where, in construing the statute of frauds, the force and effect of the decisions go to sustain the view we take of this question, by the very strongest implication: Such as, that the statute does not apply where the contract has been executed on both sides; *Bucknam v. Nash*, 12 Maine, 474; that no person can take advantage of the statute but the parties to the contract, and their privies; *Cowan v. Adams*, 10 Maine, 374; that the memorandum may be made by a broker; *Hinckley v. Arey*, 27 Maine, 862; or by an auctioneer; *Cleaves v. Foss*, 4 Maine, 1; that a sale of personal property is valid when there has been a delivery and acceptance of part, although the part be accepted several hours after the sale; *Davis v. Moore*, 13 Maine, 424; or several days after; *Bush v. Holmes*, 53 Maine, 417; or ever so long after; Brown St. Frauds, § 337, and cases there noted; that a creditor, receiving payments from his debtor without any direction as to their

application, may apply them to a debt on which the statute of frauds does not allow an action to be maintained; *Haynes v. Nice*, 100 Mass. 327; that a contract made in France, and valid there without a writing, could not be enforced in England without one, upon the ground that the statute related to the mode of procedure and not to the validity of the contract; *Leroux v. Brown*, 12 C. B. 801, — but this case has been questioned somewhat; that a witness may be guilty of perjury who falsely swears to a fact which may not be competent evidence by the statute of frauds, but which becomes material because not objected to by the party against whom it was offered and received; *Howard v. Sexton*, 4 Comstock, 157; that an agent who signs a memorandum need not have his authority at the time the contract is entered into, if his act is orally ratified afterwards; *Maclean v. Dunn*, 4 Bing. 722; that the identical agreement need not be signed, and that it is sufficient if it is acknowledged by any other instrument duly signed; *Gale v. Nixon*, 6 Cow. 445; that the recognition of the contract may be contained in a letter, or in several letters, if so connected by "written links" as to form sufficient evidence of the contract; that the letters may be addressed to a third person; Browne St. Frauds, § 346; *Fyson v. Kitton*, 30 E. L. & Eq. 374; *Gibson v. Holland*, L. R. 1 C. P. 1; that an agent may write his own name instead of that of his principal if intending to bind his principal by it; *Williams v. Bacon*, 2 Gray, 387, 393, and citations there; that a proposal in writing, if accepted by the other party by parol, is a sufficient memorandum; *Reuss v. Picksley*, L. R. 1 Exc. 342; that where one party is bound by a note or memorandum the other party may be bound if he admits the writing by another writing by him subsequently signed; *Dobelle v. Hutchinson*, 3 A. & E. 355; that the written contract may be rescinded by parol, — although many decisions are opposed to this proposition; *Richardson v. Cooper*, 25 Maine, 450; that equity will interfere to prevent a party making the statute an instrument of fraud; *Ryan v. Dox*, 34 N. Y. 307; *Hassam v. Barrett*, 115 Mass. 256, 258; that a contract verbally made may be maintained for certain purposes, notwithstanding the statute; that a person who pays his money under it cannot recover it back if the other side is willing to perform; and he can recover if performance is refused; *Chapman v. Rich*, 63 Maine, 588, and cases cited; that a respondent in equity waives the statute as a defence unless set up in plea or answer; *Adams v. Patrick*, 30 Vt. 516; that it must be specially pleaded in an action at law; *Middlesex Co. v. Osgood*, 4 Gray, 447; *Lawrence v. Chase*, 54 Maine, 196; that the defendant may waive the protection of the statute and admit verbal evidence and become bound by it. Browne St. Frauds, § 135.

It may be remarked, however, that in most courts a defendant may avail himself of a defence of the statute under the general issue. The different rule in Massachusetts and Maine grew out of the practice act in the one state and in the statute requiring the filing of specifications in the other.

It is clear from the foregoing cases, as well as from many more that might be cited, that the statute does not forbid parol contracts, but only precludes the bringing of actions to enforce them. As said in *Thornton*

v. *Kempster*, 5 Taunt. 786, 788, "the statute of frauds throws a difficulty in the way of the evidence." In a case already cited, *Jervis, C. J.*, said, "The effect of the section is not to avoid the contract, but to bar the remedy upon it, unless there be writing." See analogous case of *McLellan v. McLellan*, 65 Maine, 500.

But the defendant contends that this course of reasoning would make a memorandum sufficient if made after action brought, and that the authorities do not agree to that proposition. There has been some judicial inclination to favor the doctrine to that extent even, and there may be some logic in it. Still the current of decision requires that the writing must exist before action brought. And the reason for the requirement does not militate against the idea that a memorandum is only evidence of the contract. There is no actionable contract before memorandum obtained. The contract cannot be sued until it has been legally verified by writing; until then there is no cause of action, although there is a contract. The writing is a condition precedent to the right to sue. *Willes, J.*, perhaps correctly describes it in *Gibson v. Holland, supra*, when he says, "The memorandum is in some way to stand in the place of a contract." He adds: "The courts have considered the intention of the legislature to be of a mixed character; to prevent persons from having actions brought against them so long as no written evidence was existing when the action was instituted." *Browne St. Frauds*, § 338. *Benjamin's Sales*, § 159; *Fricker v. Thomlinson*, 1 Man. & Gr. 772; *Bradford v. Spyker*, 32 Ala. 184; *Bill v. Bament*, 9 M. & W. 36; *Philbrook v. Belknap*, 5 Vt. 386. In the last case it is said, "Strictly speaking, the statute does not make the contract void, except for the purpose of sustaining an action upon it, to enforce it." *Action to stand for trial.*

APPLETON, C. J., WALTON, DANFORTH, VIRGIN, and LIBBEY, JJ., concurred.

DEED. — DELIVERY ESSENTIAL.

BROWN v. BROWN

To constitute a delivery of a deed, the grantor must, by act, or word, or both, part with all right of possession and dominion over the instrument, with the intent that it shall take effect as his deed, and pass to his grantee.

The commitment of a deed to a third person, with the reservation of the right on the part of the grantor to withdraw it at any time before his death, and in case it was not so withdrawn, to be retained until the death of the grantor, and then to be delivered to the grantee, is no legal delivery, and will pass no title to the grantee.

WRIT OF ENTRY, to recover two thirds of a lime rock quarry, and damages for rock taken out by the defendant, dated February 23, 1875. Plea, general issue.

The plaintiffs and the defendant are brothers, and only surviving children of Oliver B. Brown, who was the owner of the premises for more

than twenty years, and until he died, November 15, 1873, unless they were conveyed by the deed to the defendant hereinafter mentioned.

Oliver B. Brown made four separate deeds of real estate, one to each of his three living children, and one to the two sons of his deceased daughter, each nominally for a similar consideration. He then made a will which provided, after the payment of his debts and funeral expenses, and a legacy of \$100 to each of his two granddaughters, and one dollar to each of his two grandsons, that his three sons should be residuary legatees, and that the defendant should be his executor.

The will was probated the third Tuesday of December, 1873, and the legacies mentioned therein were paid in January, 1874; and it was admitted that the defendant had taken lime rock from the quarries, as alleged in the writ.

The defendant offered in evidence, deed from Oliver B. Brown to the defendant, Alden U. Brown, dated December 21, 1869, and recorded November 29, 1873. Plaintiffs objected to the deed, and denied that it was legally delivered; they admitted that it was duly signed and acknowledged. Defendant also put in deed, Oliver B. Brown to John Brown, dated January 31, 1866, and recorded November 26, 1873. Also deed from Oliver B. Brown to Oliver D. Brown, dated December 13, 1861, and recorded November 24, 1873.

It was admitted that these three deeds were delivered by Oliver B. Brown to Charles C. Lovejoy, December 31, 1869, together with the will referred to, with written instructions in respect to their delivery, as follows:—

“To Charles C. Lovejoy:

“Admonished by the infirmities of age and the events transpiring around me that this is not my home, or continuing city, I have thought proper to make arrangements for the final distribution of my estate to and among my family and heirs-at-law, while I have strength and capacity so to do, and with your consent herewith commit to you for safe keeping and delivery four deeds of certain real estate, one to and for each of my sons, Alden U. Brown, John Brown, and Oliver D. Brown, and one to and for my grandsons, Oliver H. Whitney and Charles G. Whitney, and also my last will and testament. In doing this I am not unmindful that in this world of change a state of things may arise to make some alteration in my arrangements both desirable and proper, and therefore expressly reserve the right at any time to withdraw said papers, any or all of them for that purpose, from your care and keeping. But in the event of their being permitted to remain in your possession uncalled for by me during my life, you are hereby requested and directed without further advice from me, immediately upon my decease in your lifetime, to deliver said deeds to my said sons, to each one the deed for him intended, and to my said grandsons the deed for them made and designed, and also to place in the hands of my said son, Alden U. Brown, my last will and testament aforesaid, that the same may be proceeded with according to law.

“Rockland, December 31, 1869.

“Oliver B. Brown.

“Witness: William Thompson.”

It was admitted that no other delivery of either of the deeds was made by the grantor in his lifetime, and that Lovejoy, December 31, 1869, took

possession of the deeds and will, and the paper containing the written instructions, and retained them until after the decease of the grantor, whereupon he delivered the deeds to the several grantees, who received them, and caused them to be recorded, they not having been recorded in the lifetime of the grantor; and that he delivered the will to the executor, who caused the same to be duly probated.

The deed to the defendant covers the premises described in the writ.

"By consent of parties the case was withdrawn from the jury, and is submitted to the full court to determine whether there was a legal delivery of the deed from Oliver B. Brown to the defendant, so that the title passed to him; if there was not, the defendant is to be defaulted; and if the court decides that there was a legal delivery, the construction of the deed is to be determined, and the question decided whether the plaintiffs have any interest in the premises, and if so, what, and such judgment to be rendered as the law upon the facts reported requires, and the parties agree that the amount and value of the lime rock taken by the defendant and the damages shall be assessed by Francis Cobb, or some other party to be agreed upon by them, and that the case shall be remanded for that purpose."

A. P. Gould & J. E. Moore, for the plaintiffs, contended that the deed of December 21, 1869, was not duly delivered to the defendant, nor to any person for him.

T. P. Pierce, for the defendant, contended that the delivery was sufficient; and even if it were not, that as between the parties, the plaintiffs having accepted and placed upon record their deeds delivered to the same depository, at the same time, under the same circumstances, before the defendant caused his deed to be recorded, and having suffered him to take possession of the quarry, and operate it without objection for a long time, were estopped to deny the validity of the defendant's title. *Smith v. Gould*, 34 Maine, 443; *Hyde v. Baldwin*, 17 Pick. 303; *Dewey v. Bordwell*, 9 Cow. (N. Y.) 66.

VIRGIN, J. It is admitted that the deed from Oliver B. Brown to the defendant was signed and acknowledged, but the delivery is denied. All the facts pertaining to the delivery are also admitted; and the question submitted is whether they amount in law to delivery. If they do not, "the defendant is to be defaulted."

The deed in question (with three others to as many named grantees, together with his last will and testament) was committed by the grantor to one Lovejoy, "for safe keeping and delivery," with written instructions in which is found the following language: "I am not unmindful that in this world of change a state of things may arise to make some alteration in my arrangements both desirable and proper, and therefore expressly reserve the right at any time to withdraw said papers, any or all of them for that purpose, from your care and keeping. But in the event of their being permitted to remain in your possession uncalled for by me during my life, you are hereby requested and directed without further advice from me, immediately upon my decease in your lifetime, to deliver said deeds" to the respective grantees, &c.

The real original design and intention of the father in sealing the deeds to his children and grandchildren, and committing them to the deposi-

tary, are so clearly expressed as to exclude all cavil. Generally the law lays great stress upon the intention of parties as expressed in deeds and wills; and when it has once ascertained, from the terms used, the intention, it will lend its aid in executing the expressed will of the parties. But the intention of an owner of property in his attempted act of transferring it is not necessarily and always supreme. The law has prescribed certain plain rules to be observed in the execution of such important instruments as those by which the title to real property is transferred; and whatever courts may sometimes have done in their zeal to carry into effect the intention of parties, the law itself does not permit its salutary rules to be broken or bent to meet the exigencies of ignorance or negligence; deeming it better on the whole, that the intention of a party in disposing of his property should occasionally fail, than that its important and firmly established rules made and applied for the benefit of all be overridden.

It is elementary law that the delivery of a deed is as indispensable as the seal or signature of the grantor. Without this act on the part of the grantor, by which he makes known his final determination to consummate the conveyance, all the preceding formalities are impotent to impart vitality to it as a solemn instrument of title. No formulary of words or acts is prescribed as essential to render an instrument the deed of a person sealing it. It may be done by acts, or words, or by both, by the grantor himself, or by another by the grantor's authority precedent or assent subsequent, with the intent thereby to give it effect as his deed; to the grantee personally, to another authorized by the grantee to accept it, or to a stranger with a subsequent ratification, although it do not reach the grantee until after the death of the grantor. *Shep. Touch.* 57, 58; *Porter v. Cole*, 4 Maine, 20, 25, 26; *Chadwick v. Webber*, *Ib.* 141, 142; *Woodman v. Coolbroth*, 7 Maine, 181; *Turner v. Whidden*, 22 Maine, 121; *Dwinal v. Holmes*, 33 Maine, 172; *Hatch v. Bates*, 54 Maine, 136, 139.

The defendant has cited some of that numerous class of cases holding it a sufficient act of delivery on the part of the grantor to place his deed in the hands of a stranger for the use of the grantee without reserving any right to recall it, to be delivered to the grantee on the decease of the grantor. The cases which are most frequently cited, perhaps, are *Wheelright v. Wheelright*, 2 Mass. 447, and *Foster v. Mansfield*, 3 Met. 412; which have frequently been approved by various courts in this country, and by the same court, and in the late case of *Mather v. Corliss*, 103 Mass. 568.

But we have no present occasion either to admit or deny the soundness of the proposition, on account of one element contained therein, and not found in the question before us, which we deem essential, and the turning point in this case. For we consider it indispensable to the delivery of a deed, that it shall pass beyond the control or dominion of the grantor. Otherwise it cannot come rightfully within the power and control of the grantee. Their interests are adverse, and both cannot lawfully have control over the deed at the same time. The grantee does not necessarily acquire the right the moment it leaves the possession and control of the grantor, but he cannot have it before. Neither can the grantor transfer his property after his decease by deed. The statute of wills or of descent then governs all property not disposed of during the lifetime of the owner.

To be sure a freehold estate may be conveyed to commence *in futuro*, when it is so declared in the deed. *Wyman v. Brown*, 50 Maine, 139. And the grantor may "reserve full power and control over the land thus conveyed during his natural life;" *Brown v. Smith*, 52 Maine, 141; but not over the deed.

Leaving out all question of acceptance by the grantee, we think that so far as the grantor is concerned, any acts or words, either or both, whereby he in his lifetime parts with all right of possession and dominion over the instrument, with the intent that it shall take effect as his deed and pass to the grantee, constitute a delivery of a deed of conveyance; and that nothing less will suffice. Among the numerous authorities holding that the parting with the dominion over the deed is essential, is the often cited case of *Doe, &c. v. Knight*, 5 Barn. & Cress. 671 (11 E. C. L. 351), which is cited, with approbation, to this especial point by the U. S. supreme court in *Thompkins v. Wheeler*, 16 Pet. 106, 119. The application of the principle to the facts in the insurance case of *Xenos v. Wickham*, 14 C. B. N. S. 435, 470 (108 E. C. L. 861), does not modify the law. So Mr. Justice Field, in *Younge v. Guilbeau*, 3 Wall. 636, says, "To constitute delivery the grantor must part with the possession of the deed or the right to retain it."

Passing over the earlier cases in Massachusetts, the court of that commonwealth, in *Hawkes v. Pike*, 105 Mass. 560, 562, say: "It must appear that the grantor parts with the control and possession of the instrument," &c. And in the very late case of *Shurtleff v. Francis*, 118 Mass. 154, where the assignments of certain mortgages were handed by a father to his son, at the date of their respective acknowledgments, with instructions "in case he died before the son, to put them on record at once," they being deposited by the son in a safe, to which the father had access equally with the son, and the father continuing to collect the interest on the unindorsed notes secured thereby, the court say: "It is clear that as to the mortgages in question, the testator regarded and treated them as his property as much after as before the assignments, and that the son claimed no control or dominion over them before his father's death. Upon the whole evidence we are satisfied the purpose of the transaction was that the transfer of the property should not take effect until after his (father's) death. As this purpose cannot be carried into effect consistently with our statute of wills, it follows that the assignments were to be treated as nullities, and the property covered by them is to be disposed of under the residuary clause of the will."

The same result is reached in New Hampshire. In *Shed v. Shed*, 3 N. H. 432, a father placed his deed in the hands of a depository to be delivered to his sons upon his decease, in case he should not otherwise direct; and died without any further directions. The court held the delivery good. But in *Cook v. Brown*, 34 N. H. 460, after a very elaborate discussion and thorough examination of authorities, *Shed v. Shed* was expressly overruled, and the court held, that where a deed is placed in the hands of a depository to be delivered to the grantee upon the death of the grantor, provided it is not previously recalled (which the grantor expressly reserves the right and power to do, at any time), it is not a good delivery. The court say: "To make the delivery good and

effectual, the power of dominion over the deed must be parted with. Until then the instrument passes nothing; it is merely ambulatory and gives no title. It is nothing more than a will defectively executed, and is void under the statute. . . . So long as it is in the hands of a depository, subject to be recalled by the grantor at any time, the grantee has no right to it and can acquire none; and if the grantor dies without parting with his control over the deed, it has not been delivered during his life, and after his decease no one can have the power to deliver it." The same court have reaffirmed this decision in *Johnson v. Farley*, 45 N. H. 505, 510; *Bank v. Webster*, 44 N. H. 264, 269; *Baker v. Haskell*, 47 N. H. 479.

In Wisconsin, in *Prutsman v. Baker*, 30 Wis. 644, Dixon, C. J., after reviewing the authorities, says: "To constitute delivery, the grantor must divest himself of all power and dominion over the deed;" and that in that case, "there was in law no delivery of the deed during the lifetime of the grantor, for the reason that the grantor intended to, and did reserve complete dominion and control over it during his life." See also authorities cited in these cases, and also in 3 Wash. Real Prop. (4th ed.) 282; Greenl. Ev. § 297, and notes; also note 2, by Greenleaf, in 2 Greenl. Cru. 334.

We are aware that *Belden v. Carter*, 4 Day (Conn.), 66, *Morse v. Slason*, 13 Vt. 296, 307, have come to a different conclusion. We do not find them expressly overruled by the respective courts which decided them. Perhaps *Ruggles v. Lawson*, 13 Johns. (N. Y.) 285, may be considered another authority upon the same side, although the precise question involved here was not raised there. We feel certain, however, that they are opposed to the large current of authority; and our opinion is, that they cannot be defended on principle.

In the case at bar, the ancestor having expressly reserved the right, at any time, to recall the deed, there was no moment of time during his life when he had parted with the right of dominion over it; and it was therefore never delivered. The result is, the property covered by the deed is, as in *Shurtleff v. Francis*, *supra*, to be disposed of under the residuary clause of the will; and, in accordance with the terms of the report, the entry must be

Defendant defaulted. Damages to be assessed as stipulated in report.

APPLETON, C. J., WALTON, DANFORTH, PETERS, and LIBBEY, JJ. concurred.

COURT OF APPEAL.

[JUNE, 1877.]

(Before CAIRNS, L. C., COCKBURN, C. J., and BRAMWELL, L. J.)

INNKEEPER. — LOSS OF PROPERTY BY GUEST. — REQUISITES OF STATUTORY NOTICE. — NEGLIGENCE.

SPICE v. BACON.

Plaintiff, a guest at defendant's inn, retired, without locking the door of his room. During the night his watch, money, and other property, which had been left upon a chest of drawers near the door, were stolen.

By section 1 of 26 & 27 Vict. it is provided that no innkeeper shall be liable to make good any loss of property brought to his inn, except when such property shall have been "stolen, lost, or injured through the wilful act, neglect, or default of such innkeeper, or any servant in his employ."

Section 3 of said act requires the innkeeper to exhibit a copy of section 1 in a conspicuous part of the entrance to his inn. Defendant caused a notice purporting to be a copy of section 1 to be placed in the entrance to his inn, but the word "act" was omitted.

Held: (1) that the innkeeper was not protected by the statute; (2) that the question of negligence was properly left to the jury.

THIS was an action against an innkeeper to recover the value of property stolen from the plaintiff whilst staying at the inn. The facts appear sufficiently from the judgments of the court of appeal.

At the trial before Kelly, C. B., the learned judge left two questions to the jury.

1. Was the plaintiff guilty of negligence, or any breach of duty in not locking his door, which caused or materially conduced to the loss of his property? Answer: Yes.

2. Did the loss arise from the wilful default of the defendant or his manager, in not searching the porter or the servants, the porter having proved that nobody else was in the house except two gentlemen above suspicion? Answer: No.

The learned judge afterwards ruled that there was no evidence of negligence on the plaintiff's part, and entered judgment for him.

Defendant now moved in the court of appeal to have the judgment entered for him.

Grantham, Q. C. & J. H. Johnstone (R. E. Webster with them), for defendant. There are two questions: (1) Was the notice sufficient? (2) Was there any evidence of plaintiff's negligence to go to the jury? (1) The notice was a sufficient copy of the section. The omission of the word "act" is a mere verbal one, which can deceive nobody. If this verdict stands it will be a decision that every punctuation must be put in. "Wilful" will apply as well to "neglect or default" as to "act." (2) The lord chief baron should have left the whole question to the jury. They would have found still more strongly that the plaintiff was negligent if the fact that there were drawers in the room, in which he might have locked up his property, had been before them. It would, therefore, be

useless to send the case again before a jury. Under the judicature acts a new trial should not be granted unless the court are satisfied that a substantial injustice has been done by what is complained of. The *prima facie* liability of the innkeeper may be rebutted by proving negligence on the part of the guest. In *Cashill v. Wright* 6 E. & B. 891, Erle, J. (at p. 900), lays down the rule of law on this subject: "We think that the rule of law resulting from all the authorities is that, in a case like the present, the goods remain in the charge of the innkeeper and the protection of the inn, so as to make the innkeeper liable as for breach of duty, unless the negligence of the guest occasions the loss in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances." See also *Armistead v. Wilde*, 17 Q. B. 261; *Jones v. Jackson*, 29 L. T. Rep. N. S. 399; *Oppenheim v. White Lion Hotel*, 25 L. T. Rep. N. S. 93; L. Rep. 6 C. P. 515. Here there was evidence that plaintiff did not take the reasonable care with respect to his property which a prudent man would have done.

Herschell, Q. C. & Gainsford Bruce, for plaintiff. (1) The notice is not sufficient to protect the defendant. Not only is the word "act" left out, but the words, "or his servant authorized by him for that purpose," are added. Where an act relieves a person from his common law liability, its provisions must be strictly complied with. *Vaux v. Vollsans*, 4 B. & A. 525. Besides, the sense of the section is entirely altered by the word "act" being left out. In *Squire v. Wheeler*, 16 L. T. Rep. N. S. 93, Byles, J., held that "wilful," in section 1 of 26 & 27 Vict. c. 41, applied only to "act," and not to "neglect or default." The notice must cover the rights of the parties. Here the landlord holds himself out as being liable only for the "wilful neglect or default" of himself or his servants, so that if one of his servants had clearly stolen the property, the landlord would not have been liable on the notice. (2) There was no evidence of contributory negligence on the plaintiff's part, except that the bedroom door was not locked. A jury could not reasonably find negligence on the facts. It is the known practice and ordinary habit of mankind not to put their things into a drawer, and many people object to locking their bedroom door for fear of being surprised by fire. Plaintiff did not omit to do anything which ordinary care would suggest.

Lord Chancellor CAIRNS. We think it would be more satisfactory before disposing of this case to read over again the summing up of the lord chief baron. We will deliver judgment on one part of the case to-morrow. We may remove one question, on which we do not entertain any doubt, from the case at once. We think that the notice put up by the defendant was not sufficient to satisfy the statute. I very much regret having come to the conclusion, because there was no doubt a *bond fide* intention on the part of the defendant to give a notice which would be an exact compliance with the statute. The omission was merely *per incuriam*. At the first sight it appeared to me that it might be looked upon as an omission of one or two words not material to the sense of the statute, and I was not prepared to hold that a notice, given in good faith as and intended to be a copy of the statute, if all that could be said against it was that one or two words not material to the sense had been omitted,

was not a sufficient copy of the statute to protect the innkeeper. But here the word omitted was "act," and the sentence, which should have read, "when the property shall have been stolen, lost, or injured through the wilful act, default, or neglect of the innkeeper, or any servant in his employ," now reads, "through the wilful default or neglect of" &c. There is, therefore, no statement in the notice admitting a continuance of the common law liability if the goods are lost, &c., through the wilful act of the defendant, and the result is this: if the goods were clearly stolen by a servant in the employment of the innkeeper, the notice, as it now reads, would be a notice that his common law liability in that case had ceased. It is sufficient to say, if that be so, that the omission entirely alters the operation of the statute, and it is not, therefore, a notice stating the law in the way the 1st section of the statute requires it to be stated. I feel obliged, therefore, with great reluctance, to hold that the defendant is in the same position as if the statute had never been passed for his protection.

COCKBURN, C. J. I quite concur in the judgment of the lord chancellor. If this had been a mere clerical error, I should hold that the notice might still suffice to meet the requirements of the act. It would still be a "copy" of the section. But when we find that by the notice the rights and liabilities of the parties generally under the statute are not stated, and therefore in effect a substantial part of the statute is omitted, I cannot think that the notice in this case is sufficient.

BRAMWELL, J. A. I am of the same opinion, and I have nothing to add.

June 26. — Lord Chancellor CAIRNS. We disposed yesterday of the question on the construction of the statute, but there is a further question, as to the conduct of the plaintiff, and whether he was guilty of such negligence as would disentitle him to recover. The law is free from all doubt. The law from early times has been that an innkeeper was bound, if he had room, to receive guests, and, as a general rule, to keep securely the property of his guests. But there is this exception: the general rule does not entitle the guest to divest himself of the duty to take reasonable care, so as to invest the innkeeper with the character of an absolute and unqualified insurer. An instance of this is given in *Calye's case*, 1 Smith's L. C. 7th edit. There it is said that if a guest goes to an inn with a servant or companion, through whose dishonesty the guest's property is lost, it should be the loss of the guest; for it was his fault for keeping such company or having such a servant. The cases subsequently treat this as an illustration, and the exception is expanded by using words which show that the innkeeper is not liable if the negligence of the guest has caused or contributed to the loss. *Cashill v. Wright*, 6 E. & B. 891. The circumstances, therefore, are to be considered, the value of the property, the means of securing it, and any other circumstances. Whether the guest has or has not exercised reasonable care is a question for the jury, and no general rule can be laid down; still less can there be any general rule of law, for it is a question of fact. The first question here is, was there evidence to go to the jury that there was not reasonable care on the part of the plaintiff? When I say was there evidence, I mean was there evidence from which the jury could reasonably conclude that there was not such care. The defendant keeps a large hotel at Brighton,

where the plaintiff was a guest; the property in question was of small bulk, so that it would be easily abstracted, and of considerable value, the value being agreed at £114 8s. 6d. I do not forget that in these cases the question is one of comparison, and I find the legislature, in the Innkeeper's Act (26 & 27 Vict. c. 41), taking a much smaller sum, £30, as the limit of an innkeeper's ordinary liability. That being the character of the property, the plaintiff might have handed it over to the innkeeper to take care of, but, as to the watch especially, that might not be a convenient course; there was a chest of drawers near the door with a lock and key to them, and a dressing-table with a drawer in it which could be locked. The property was placed on the drawers and on the table, except the money, which was put into the pocket of some article of dress. The property was taken away in the night. The plaintiff might have locked the door of his room, but some people have an objection to doing that; or he might have locked the property up in the drawers. He took none of these courses, but left the property without taking steps for its security, and the result was that it was stolen. On the facts, it is not necessary to say that the jury ought to have concluded that the plaintiff did not take reasonable care, if there was sufficient evidence to go to the jury on which they could reasonably find against the plaintiff. The jury, on the question left to them, have found for the defendant, and having so found on the question, if the question was a proper one, and accompanied by proper directions, there is an end of the case, and there must be judgment for the defendant. That brings me to the main point, as to the form of the question left to the jury and the direction. The first question left to the jury was as follows: "Was the plaintiff guilty of negligence or of any breach of duty in not locking his door, which caused, or materially contributed, to the loss of his property?" If this question stood alone, it would be open to criticism; but it was accompanied and preceded by a summing up and explanation, and it would be unfair to take it alone. Besides this, counsel did not object to the question. In the summing up there is a clear statement that there is no rule of law that a guest is bound to lock his door. In the summing up, and in the final question, there is reference to one particular act, that of locking the door, and the criticism to which the direction is open is that, instead of leaving to the jury the question whether the plaintiff took reasonable care, the chief baron put it to the jury whether they thought the plaintiff ought to have locked his door; I should be sorry to say any single word implying that there is any rule of law as to this. The fault of the direction, if any, is that it is too narrow; but the jury found for the defendant on this point, and in the face of a summing up which, on the whole, was not favorable to the defendant. The conclusion is, that if the direction had been broader, the jury would have found for the defendant, and if it is open to criticism, it would be to criticism from the defendant. If it had been more correctly worded, it would have been more favorable to the defendant. It meant this: "You have all the circumstances before you, and you can see what steps the plaintiff could have taken to secure his property, and you must consider, if he was not prepared to take any of these steps, whether he ought to have locked his door." In substance, the jury were asked to consider all the circumstances. On a question of

misdirection, by Order XXXIX., r. 3, we must consider whether some substantial wrong or miscarriage has been occasioned by the direction. Assuming that the question left to the jury was too narrow, I cannot think that any substantial wrong was occasioned by it, for if the direction had been broader, there would still have been a verdict for the defendant, so we ought not to send the case back for a new trial. I therefore think that the finding on this question amounts to a verdict for the defendant, and there should be judgment for the defendant.

COCKBURN, C. J. I entirely concur that the law is as it has been laid down by the lord chancellor, and I agree that the judgment should be for the defendant, and there should be no new trial. I am anxious to guard against expressing any opinion that the verdict of the jury was right, but I think it is a question for the jury whether reasonable care was exercised by the plaintiff. It is a question of fact on all the circumstances, and if I could see my way to the conclusion that the jury were not invited to consider all the circumstances, I should be disposed to direct a new trial. Taking the passages in the summing up which have been read by the lord chancellor, it appears to me that there must have been present to the minds of the jury, not the abstract question whether it is a prudent course for a guest at a hotel not to lock his door, but whether the plaintiff acted prudently under the circumstances, and one circumstance to be considered would be the value of the property with reference to its bulk. The question was one for the jury, and there was evidence to go to them, and therefore I think there is no reason for ordering a new trial.

BRAMWELL, L. J. I am entirely of the same opinion. I have some misgiving as to whether the form of the chief baron's direction is open to any objection at all. The defendant says: "I find no fault with the plaintiff for not handing over the property to be taken care of, nor for not locking it up in the drawers, but I find fault with him because, as things were so, he did not lock his door."

Judgment reversed and entered for the defendant.

[FEBRUARY, 1877.]

MASTER AND SERVANT.—DANGEROUS EMPLOYMENT.—RAILWAY.—
INJURY OF CONTRACTOR'S SERVANT.—NEGLIGENCE, ETC.

WOODLEY v. METROPOLITAN RAILWAY CO.

Plaintiff was in the employ of a contractor engaged by defendants to make excavations in a tunnel. Trains were constantly passing the spot, which was on a curve and dark. No one was stationed to give an alarm, although precautions had been previously taken to protect other workmen similarly employed. Plaintiff was struck by a train and injured. *Held*, that defendants were not liable.

THE action was to recover damages for injury sustained by the plaintiff whilst working under a contractor upon the defendants' railway. The

jury at the trial found for the plaintiff with £300 damages, but leave was reserved to the defendants to move to enter the verdict for them. A rule was obtained, and on cause being shown, was discharged by the exchequer division.

The defendants appealed from this decision. The facts and the arguments before the court of appeal fully appear in the judgments (*post*).

Cave, Q. C. & *Meadows White*, for the defendant, cited: *Seymour v. Maddox*, 16 Q. B. 326; *Indermaur v. Dames*, 14 L. T. Rep. N. S. 484; L. Rep. 1 C. P. 274, and in error 16 L. T. Rep. N. S. 293; L. Rep. 2 C. P. 311; 36 L. J. 181, C. P.; *Morgan v. Vale of Neath Railway Company*, 18 L. T. Rep. N. S. 564; L. Rep. 1 Q. B. 149; 35 L. J. 23, Q. B.; *Wiggett v. Fox*, 11 Ex. 832.

Francis, for the plaintiff, cited *Bilbee v. The London, Brighton & South Coast Railway Company*, 18 L. T. Rep. N. S. 146; 34 L. J. 182, C. P.; *Skelton v. The London & Northwestern Railway Company*, 16 L. T. Rep. N. S. 563; L. Rep. 2 C. P. 631; L. J. 249, C. P.; *Patterson v. Wallace*, 1 Macq. H. of L. Cas. 748; *Bartonshill Coal Company v. Reid*, 3 Macq. H. of L. Cas. 266; *Holmes v. Clarke*, 31 L. J. 356, Ex.; *Watling v. Oastler*, 23 L. T. Rep. N. S. 815; L. Rep. 6 Ex. 73; 40 L. J. 43, Ex.

The following judgments were delivered:—

COCKBURN, C. J. In this case, which was an action to recover damages for an injury sustained by the plaintiff from one of the defendants' trains having struck him while at work on their premises, the jury found for the plaintiff with £300 damages, but a rule was obtained on leave reserved to enter a verdict for the defendants, on the ground that the plaintiff, having voluntarily exposed himself to the danger, the defendants were not bound to adopt precautionary measures for his protection. The facts of the case are as follows: The plaintiff was a workman in the employ of a contractor engaged by the defendants to execute certain work on a side wall on their line of railway, in a dark tunnel. Trains were passing the spot every ten minutes, and the line being there on a curve, the workman would not be aware of the approach of a train till it was within twenty or thirty yards of him. The space below the rail and the wall, on which the workman had to stand while at work, was just sufficient to enable him to keep clear of a train when sensible of its approach. The place in question was wholly without light. No one was stationed to give notice of an approaching train. The speed of the trains was not slackened when arriving near where the men were at work, nor was any signal given by sounding the steam whistle. It is unnecessary to say that the service on which the plaintiff was thus employed was one of extreme danger. While he was reaching across the rail to find a tool he had laid down, a train came upon him suddenly, struck him, and seriously injured him. It appeared that, on a previous occasion, when similar work was being done, a lookout man had been stationed to give warning of approaching trains, but this precaution had been discontinued. Under these circumstances, I have no hesitation in saying that, morally speaking, great culpability attaches to the defendants for having omitted to adopt any precautionary measures to lessen as much as possible the danger to which the plaintiff and his fellow-workmen were exposed. The jury have found that they were herein guilty

of negligence; and, according to the recent decision of the House of Lords in *Bridges v. The North London Railway Company*, 30 L. T. Rep. N. S. 844; 43 L. J. N. S. 151, Q. B., the question of negligence, if there is any evidence to go to the jury, is for the jury, and not for the court. But in this case, I am bound to say that, in my view, so far as the question of negligence was concerned, not only was there evidence to go to the jury, but the verdict was in this respect perfectly right. Whether, notwithstanding that the injury to the plaintiff was caused by the negligence of the defendants, the latter are in point of law liable, is a different question, and one on which I have had considerable difficulty in making up my mind. If the plaintiff, in doing the work on the railway, is to be looked upon as the servant of the company, the decision of the exchequer division in his favor cannot, as it seems to me, be upheld. It could not be said that any deception was practised on the plaintiff as to the degree of danger to which he would be exposed. He must be taken to have been aware of the nature and character of the work, and its attendant risk, when he entered into the employ of the contractor for the job in question; or, at all events, he must have become fully aware of it as soon as he began to work. If he had been misled in supposing that precautionary measures, such as the dangerous nature of the service rendered reasonable necessary, would be taken, he had a right to throw up his engagement, and to decline to go on with the work; and such would have been his proper course. But, with a full knowledge of the danger, he continued in the employment, and had been working in the tunnel for a fortnight when the accident happened. A man who enters upon a necessarily dangerous employment with his eyes open, takes it with its accompanying risks. On the other hand, if the danger is concealed from him, and an accident happens before he becomes aware of it; or if he is led to expect, or may reasonably expect, that proper precautions will be adopted by the employer to prevent or lessen the danger, and from the want of such precautions an accident happens to him before he has become aware of their absence, he may hold the employer liable. If he becomes aware of the danger which has been concealed from him, and which he had not the means of becoming acquainted with before he entered on the employment, or of the necessary means to prevent mischief, his proper course is to quit the employment. If he continues in it, he is in the same position as though he had accepted it with a full knowledge of its danger in the first instance. He must be taken to waive his right to call upon the employer to do what is necessary for his protection, or, in the alternative, to quit the service. If he continues to take the benefit of the employment, he must take it subject to its disadvantages. He cannot put on the employer terms to which he has now full notice that the employer never intended to bind himself. It is competent to an employer, at least so far as civil consequences are concerned, to invite persons to work for him under circumstances of danger caused or aggravated by want of due precautions on the part of the employer. If a man chooses to accept the employment, or to continue in it, with a knowledge of the danger, he must abide the consequences, so far as any claim to compensation against the employer is concerned. Morally speaking, those who employ men on dangerous work without doing all in their

power to obviate the danger are highly reprehensible, as I certainly think the company were in the present instance. The workman, who depends on his employment for the bread of himself and his family, is thus tempted to incur risks to which, as matter of humanity, he ought not to be exposed. But looking at the matter in a legal point of view, if a man, for the sake of the employment, takes it, or continues in it, with a knowledge of its risks, he must trust to himself to keep clear of injury. But it may be said the plaintiff was not in the service of the defendants at all; he was on their premises, not only in lawful business, but it may be said by their invitation, as he was working under a contractor employed by them to do the work in question; he sustained the injury complained of through what the jury have found to have been negligence on the part of the company; he is, therefore, entitled to damages. But this reasoning appears to me to be fallacious. That which would be negligence in a company, with reference to the state of their premises or the manner of conducting their business, so as to give a right to compensation for an injury resulting therefrom to a stranger lawfully resorting to their premises in ignorance of the existence of the danger, will give no such right to one who, being aware of the danger, voluntarily encounters it, and fails to take the extra care necessary for avoiding it. The same observation arises as before. With full knowledge of the manner in which the traffic was carried on, and of the danger attendant on it, the plaintiff thought proper to remain in the employment. No doubt he thought that, by the exercise of extra vigilance and care on his part, the danger might be avoided; by a want of particular care in depositing one of his tools, he exposed himself to the danger, and, unfortunately, suffered from it. He cannot, I think, make the company liable for injury arising from danger to which he voluntarily exposed himself. The contractor, the immediate employer of the plaintiff, undertook to execute work which he knew would be attended with danger in the service under which it was to be executed. The plaintiff, as his servant, did the same. They are in a very different position from that in which they would have stood had they been at work on the defendants' premises in ignorance of the danger. The conclusion, therefore, at which I have arrived, I must say with much regret, as I think the conduct of the defendants open to great reprehension, is, that the judgment of the exchequer division is wrong and must be reversed.

MELLISH, L. J. The course which the argument in this case has taken makes it desirable to consider, in the first place, whether railway companies are under any obligation to take reasonable care that the servants of contractors, who are brought on the line for the purpose of repairing the works of the railway, do not suffer personal injury from the passing trains. In the court below it seems to have been taken for granted that railway companies were under such an obligation; but it is now contended that they are under no such obligation, and that the servant of the contractor, if he does not like to incur the risk of being run over, must throw up his employment with his master, and that, however great may be the risk to which he is exposed, and however great may be the negligence of the arrangements of the railway company with respect to the running of their trains, he has no action against the railway company for

any injury he may suffer. Now, there can be no doubt that by the law of this country every person who carries on a dangerous trade is bound to take reasonable care that no other person (not being his own servant) suffers a personal injury from the manner in which his trade is carried on. No one has a right to carry on his trade in such a manner as is likely to cause personal injury to others. This liability is not founded on contract. It may be modified or taken away by contract, but it is founded on the right, which is inherent in every one, not to be subject to personal injury from the wrongful or careless act of another. In the case of a servant, who enters into the service of a master who carries on a dangerous trade, the right of the servant to be protected in his person is largely modified by the contract between master and servant. The servant is considered to contract that he will run all the ordinary risks arising from the nature of his master's business, and from the regulations under which it is carried on, and all risks arising from the negligence of his co-servants, but the servant of the contractor enters into no such contract with the railway company, because he enters into no contract with the railway company at all, and his contract with his own master is *res inter alios acta*, and, in my opinion, is altogether immaterial. I am unable to discover any principle by which railway companies are freed from the liability of taking reasonable care that the servants of contractors are not injured by the passing trains. I think the company is entitled to assume that contractors' laborers who are brought on their line to do repairs are persons who have reasonable nerve and reasonable skill in avoiding danger; but if the company's arrangements are such that persons who have as much nerve and as much skill in avoiding danger as it can be expected contractors' laborers would have, are nevertheless exposed to an undue risk of personal injury, I think that the company are liable for any personal injury they may in consequence suffer. The work which the plaintiff in this case was employed to do was not in itself dangerous at all; it was disagreeable work, because it was to be performed in a dark and dirty tunnel; but the danger to which the plaintiff was exposed arose entirely from the act of the company in running their trains, and it is because the danger arose from the acts of the company that the company were the persons upon whom the duty lay to see that the trains were run in such a manner and with such precautions that the servants of the contractors, who were working in the tunnel with the leave and for the benefit of the company, were exposed to no undue risk. This being in my opinion the nature of the liability of the company, I have next to consider whether there was any evidence that the plaintiff, on the occasion in question, was, through the negligent arrangements of the company, exposed to a greater risk of personal injury than he ought to have been, and I agree with the court below there was such evidence. The question I have to decide is not, whether I myself, if I had been on the jury, should have found that the company's arrangements were negligent, but whether there was evidence from which a jury might reasonably so find. This question mainly depends upon the degree of skill and nerve in avoiding passing trains, which may reasonably be expected from a bricklayer's laborer in a dark tunnel. This is obviously a question of fact on which it is utterly impossible to lay down any rule of law. The jury, under the

direction of the judge, have found, that under all the circumstances of the case, — the darkness of the tunnel, there being a curve at the place where the plaintiff was working, so that an approaching train could not be seen, the noise of the work and of trains passing on the other side making it difficult to hear an approaching train, — the plaintiff was not sufficiently protected from the risk of personal injury. The jury have also expressed an opinion that the proper precaution to have taken was for the company to have placed a man to warn the workmen when a train was coming. I am quite unable to say, whether this would have been a proper or a sufficient precaution; but I cannot hold that the conclusions to which the jury have come on pure questions of fact, on which, as it seems to me, some men might reasonably come to one conclusion and some to another, was so wrong that the court is entitled to enter a verdict for the defendants on the ground that there was no evidence to go to the jury. It was argued, however, strongly, on the part of the defendants, that as the plaintiff had been working in the tunnel for a fortnight, though not at the spot at which he was working when the accident happened, and knew that the company were running their trains as usual without taking any precautions for the protection of the workmen in the tunnel, he must be taken to have assented to the trains being so run, and on that account cannot recover. This, as I understand, is the objection which made Baron Cleasby doubt in the court below whether the rule should not be made absolute to enter a verdict for the defendants. Now this defence in substance amounts to a defence of leave and license; and it is possible that though the plaintiff has not bound himself by any contract with the defendants to take upon himself all risk arising from the passing trains, yet he may have licensed the defendants to run their trains as usual without taking any precautions to protect him, and it is necessary to consider whether it was proved that he did so. Is it, then, a necessary inference in point of law from the fact of the plaintiff having worked in the tunnel for a fortnight without making any objection, and without abandoning his service with his master, that he consented to the company's running their trains as usual without taking any precautions for the safety of the workmen in the tunnel? In my opinion it is not. In the first place, it is by no means certain that the plaintiff, an ordinary bricklayer's laborer, understood at all what the extent of the risk was which he was running, or what the precautions were, which were reasonably necessary. In the next place, assuming that he did understand what the risk was which he was running, and that he knew that the workmen in the tunnel were not reasonably protected, it seems to me it would be extremely unjust to hold that he was obliged either at once to quit his master's employment or else to lose his right of action against the railway company for negligently running over him. I think he is entitled to say, I know I was running great risk, and did not like it at all, but I could not afford to give up my good place from which I get my livelihood, and I supposed that if I was injured by their carelessness I should have an action against the company, and that if I was killed my wife and children would have their action also. Suppose this case: A man is employed by a contractor for cleansing the streets to scrape a particular street, and for the space of a fortnight he has the opportunity of observing that a particular Hansom cabman drives his cab

with extremely little regard for the safety of the men who scrape the streets. At the end of a fortnight, the man who scrapes the streets is negligently run over by the cabman. An action is brought in the county court, and the cabman says in his defence, "You knew my style of driving. You had seen me drive for a fortnight. I was only driving in my usual style." "Yes, but your usual style of driving is a very negligent style, and my having seen you drive for a fortnight has nothing to do with it." It will not be disputed that the scraper of the streets in the case I have supposed is entitled to maintain his action, and in my opinion his case does not differ from the case we have to determine, there being no contract between the defendants and the plaintiff any more than between the cabman and the scraper of the streets. On the whole, I am of opinion that the judgment of the court below ought to be affirmed.

BAGGALLAY, J. A. I agree with Mellish, L. J., in thinking that the judgment of the court below should be affirmed. In the view which I take of the case, the plaintiff cannot be regarded as a servant of the company; he was the servant of the contractor; and at the time when the accident occurred he was upon the premises of the company in the course of fulfilling on behalf of his employer a contract in which his employer and the company were jointly interested; he was there upon lawful business, and not upon bare permission. If this be the true view of the case, it appears to me that it cannot be distinguished in principle from that of *Indermaur v. Dames, ubi supra*; and that there was a duty imposed by law on the company either to avert the danger or to give the plaintiff reasonable notice of it so that he might protect himself. Was there, then, in fact, neglect on the part of the company in either of these respects? I fully assent to the view that the company had a right to expect that the contractor's laborers would be men possessed of a reasonable amount of skill in the performance of their duties, of knowledge of the ordinary risks to which their employment exposed them, and of prudence in avoiding the dangers to which they were subjected; but the circumstances of the present case were very peculiar: the accident which occurred to the plaintiff was not occasioned by the work upon which he was engaged, — as by the falling of any portion of the brickwork, or the giving way of a scaffold, — but by the company running their trains at the time when that work was going on: the real question is, whether the company's train was run in such a manner and with such precautions that the plaintiff was not exposed to any undue risk, and this was essentially a question for the jury. As has been stated by the lord justice, it is impossible to lay down any general rule of law applicable to cases of this description; each must depend upon its own circumstances. The jury found a verdict for the plaintiff. The learned judge by whom the case was tried was not dissatisfied with that verdict, and the court of exchequer have concurred in it. So far as I am competent to form an opinion from the material facts before us, I agree with the jury in thinking that reasonable precautions were not taken by the company for the protection of the plaintiff. Whether the jury were right or not in the opinion which they expressed as to what would have been a sufficient precaution, it is immaterial to consider. It was contended on the part of the company that they were under no obligation to adopt measures for the

protection of the servants of a contractor against the careless or negligent acts of their own servants, that the plaintiff and other persons similarly situated must enter upon such employment at their own risk, and that unless they were willing to so they should refuse to be so employed. If this is the true state of the law, the company would probably be entitled to have the judgment of the court below reversed; but I cannot adopt this view, concurring, as I do most entirely, in the reasons assigned by Willes, J., in delivering the judgment of the court in the case of *Indermaur v. Dames*, to which I have already alluded.

MELLOR, J. I am of opinion that the judgment of the court of exchequer must be reversed. The defendants can only be made liable on the proof of some negligent conduct on their part which occasioned the accident by which the plaintiff was injured, and I can discover none. The lord chief baron, in his judgment, suggests, and it is upon this matter alone that he relies as the foundation of the liability of the defendants, "that it was reasonable for the jury to hold that there was an obligation and duty imposed upon the company in this case, for the preservation of human life, to have stationed a man at the bend of the curve, who would have been enabled, on the approach of the train, to have warned the workman and enabled him to escape danger." Whether any such precaution would have been of any practical value may be doubtful, considering the number of trains passing, even were it possible in the tunnel; but, if it were, I can see no ground for inferring such an obligation and duty to have existed under the circumstances on the part of the company. Whether it might have been a prudent thing for the contractor to have stipulated for additional precautions, when he undertook the repair of the tunnel, is quite a different question, but I can see no implied obligation on the part of the company, at their expense, to employ such a person as the lord chief baron referred to. No such person was in any sense necessary for the proper and ordinary working of the defendants' trains, or conducting their business; and it is not suggested that there was anything done by the company or omitted by the company in the mode of working their trains or carrying on their business of an unusual character, or in any respect differing from the course of working which they had used during the period of the plaintiff's employment; and it seems to me that in principle, so far as the liability of the defendants is concerned, the case does not differ from that of *Ellis v. Great Western Railway Company*, L. Rep. 9 C. P. 551. It is now completely settled that a master is not liable to one servant for the consequences resulting from the negligence of a fellow-servant in the course of the same employment, on the ground that the servant undertakes, as between himself and his master, the natural risks and perils incident to the performance of his duty, and the presumption is that such risks are considered in the wages. *Morgan v. Vale of Neath Railway Company*, *ubi supra*. When, therefore, the contractor in this case undertook to perform the work in question, and in the performance of which the plaintiff was engaged at the time of the accident, it is reasonable to assume that the character and nature of the work was duly considered and included in the price paid for it; and if he thought there was danger of an unusual character in the nature of the work, he ought either to have stipulated with his master, or the

company, to provide some additional means or precautions against such possible danger, or, as he was better able to judge than they whether the work could safely be performed without additional precautions, he ought to have refused the task unless they were provided. Now, whether the master has done anything which may make him liable as between himself and the plaintiff we are not concerned to decide. *Priestly v. Fowler*, 3 M. & W. 1, which is a leading case on the subject, has a strong bearing upon this state of things, and throws light upon the principle upon which this case may be decided. In that case it was said by Lord Abinger, in delivering the judgment of the court, the mere relation of master and servant can never imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. He is, no doubt, bound to provide for the safety of the servant in the course of his employment to the best of his judgment, information, and belief. The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends danger to himself; and in most cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as his master." In the present case the plaintiff had probably the same opportunity of judging of the possible danger as his master had, and might have declined the work and refused to undertake it without additional precautions being taken or means provided by his master; but as it appears to me that was a matter affecting his relation with his master, and not as in any way affecting the duty of the company, I think that the company can in no respect be said to be guilty of negligence; they conducted the business in the ordinary way, and the accident did not occur through any misconduct or mismanagement on their part; but that the plaintiff, who must be presumed to know the ordinary traffic of the company, and the limited space within which he had to work, came within the maxim *volenti non fit injuria*, and has at all events no remedy against the defendants.

BAGGALLAY, J. A. (who read the judgment) said: Mr. Justice Grove has not delivered a separate judgment, but he agrees in that of Mr. Justice Mellor, and as the majority of the court are in favor of the appellants, the form of the judgment will be to enter the verdict for the defendants. *Judgment for the defendants. Judgment below reversed.*

SUPREME COURT OF MAINE.

(To appear in 66 Me.)

PRACTICE. — TRIAL. — ARGUMENT OF COUNSEL.

ROLFE v. INHABITANTS OF RUMFORD.

It is error for the presiding justice to permit counsel, in addressing the jury, against seasonable interposition, to proceed with his argument upon asserted facts not in evidence and having no legitimate pertinency to the issue.

ON exceptions and motion.

Case, for injury to plaintiff's wife through defective town way, January 15, 1874.

The case was on trial nearly a week and resulted in a verdict for the plaintiffs of \$275, which they moved to set aside for inadequacy, as against law and evidence. They also filed the following bill of exceptions:—

"E. G. Harlow, one of the counsel of the defendants, in his closing argument to the jury at the trial of said case, was permitted by the court, against the seasonable objection and protest of the counsel for the plaintiffs, to state to the jury the amount of damages recovered in other cases than the one on trial, concerning which no testimony had been offered, and which was not in any law report, and to declare as matter of fact that said cases were identical or similar to the one then on trial; and to argue that the damages in the case on trial should in no event be greater than the damages found by the jury in the cases so commented upon; and further, that the cause of action in the case on trial had probably passed out of the control of the plaintiffs in the case, and of the administrator of Elizabeth S. Rolfe, and to state to the jury certain alleged facts as to the death by consumption of other persons than the said Elizabeth S. Rolfe, alleged by said Harlow to be within his knowledge, but concerning which no testimony was offered; and to argue to the jury that the counsel for plaintiffs came from another county, and had appeared in other cases against other towns in Oxford County, and had recovered damages therein against said towns, although no evidence was offered touching the same, which statements and arguments the plaintiffs' counsel seasonably requested the court to exclude, but which the court declined to exclude. The presiding judge failed to give any instructions touching said acts, arguments, and statements of alleged facts done and made by said counsel for the town, except that the facts were to be settled from the testimony in the case given under oath."

A. A. Strout & S. C. Andrews, for the plaintiffs.

E. G. Harlow, for the defendants.

VIRGIN, J. We think the learned judge before whom this case was tried erred in permitting the counsel for the defendants, against the seasonable interposition of the plaintiffs' counsel, to proceed with his argument upon asserted facts not in evidence and having no legitimate pertinency to the issue.

It is indispensable to the orderly course of judicial procedure and an

impartial administration of the laws, that those officially engaged in the trial of causes shall faithfully observe the established rules of practice. The Constitution guarantees to the parties of a cause the right of a trial by a jury duly constituted, and to have the trial conducted according to the course and usage of the common law and the long established rules of judicial proceedings; and whenever these rules are substantially violated, the right of the parties litigant is to that extent denied.

The law, with great care, prescribes numerous rules for determining the admissibility of the facts to be submitted to the jury, vigilantly and scrupulously excluding from their consideration all such as do not come within the rules. These rules require among other things that the facts shall be material and pertinent to the issue; and that, when not contained in documents, they shall be delivered under the sanctions of an oath, and their truthfulness tested by cross-examination. Even a juror's own personal knowledge of pertinent facts cannot be considered by himself and his fellows in making up their verdict, unless it take on the form of testimony by being delivered from the stand by the juror under oath as a witness. Otherwise, testimony which might influence a verdict would escape the ordeal of cross-examination and discussion. As a sequence of these rules, one of the essential elements in the trial by jury is, that they are sworn to render their verdict in accordance with such facts only as are adduced at the trial; and whenever it is rendered without evidence, against evidence, or upon incompetent evidence which may have come to the knowledge of the jurors by direct ruling in the court-room, or by accident or mistake outside of the court-room, it is liable to be set aside and a new trial granted.

So the courts have usually been very firm, whenever occasion has required, in confining counsel within proper and reasonable bounds to whatever is pertinent to the matter on trial. Statements of alleged facts not adduced in evidence, and comments thereon, are irrelevant, not pertinent, and are therefore clearly not within the privilege of counsel; and any such practice on the part of counsel should be promptly checked, especially when objected to by the other side. *Berry v. State*, 10 Ga. 511; *Mitchum v. State*, 11 Ga. 615; *Bullock v. Smith*, 15 Ga. 395; *Dickerson v. Burke*, 25 Ga. 225; *Wightman v. Providence*, 1 Clifford, 524; *Tucker v. Henniker*, 41 N. H. 317.

In this connection we adopt the views of the courts of Georgia and New Hampshire, expressed in the following forcible and felicitous language:—

“It is irregular and illegal for counsel to comment upon facts not introduced in evidence before the jury, and not legally competent as evidence. The counsel represents and is a substitute for his client; whatever, therefore, the client may do in the management of his cause may be done by his counsel. The largest and most liberal freedom of speech is allowed, and the law protects him in it. The right of discussing the merits of the cause, both as to the law and the facts, is unabridged. The range of discussion is wide. He may be heard in argument upon every question of law. In his addresses to the jury, it is his privilege to descend upon the facts proved, or admitted in the pleadings; to arraign the conduct of the parties; impugn, excuse, justify, or condemn motives, so far as they are

developed in evidence, assail the credibility of witnesses, when it is impeached by direct evidence, or by the inconsistency or incoherence of their testimony, their manner of testifying, their appearance on the stand, or by circumstances. His illustrations may be as various as the resources of his genius; his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit, or wings to his imagination.

"To his freedom of speech, however, there are some limitations. His manner must be decorous. All courts have power to protect themselves from contempt; and indecency in words or sentiments is contempt. This is a matter of course in the courts of civilized communities, but not of form merely; for no court can command from an enlightened public that respect necessary to an efficient administration of the law, without maintaining, in its business proceedings, that courtesy, dignity, and purity which characterize the intercourse of gentlemen in private life. . . .

"When counsel are permitted to state facts in argument, and to comment upon them, the usage of courts regulating trials is departed from, the laws of evidence are violated, and the full benefit of trial by jury is denied. It may be said, in answer to these views, that the statements of counsel are not evidence; that the court is bound so to instruct the jury, and that they are sworn to render their verdict only according to the evidence. All this is true; yet the necessary effect is to bring the statements of counsel to bear upon the verdict with more or less force, according to circumstances; and if they in the slightest degree influence the finding, the law is violated, and the purity and impartiality of the trial tarnished and weakened. If not evidence, then manifestly the jury have nothing to do with them, and the advocate has no right to make them. It is unreasonable to believe the jury will entirely disregard them. They may struggle to do so, and think they have done so, and still be led involuntarily to shape their verdict under their influence. That influence will be greater or less, according to the character of the counsel, his skill and adroitness in argument, and the force and naturalness with which he is able to connect the facts he states with the evidence and circumstances of the case. To an extent not definable, yet to a dangerous extent, they unavoidably operate as evidence which must more or less influence the minds of the jury, not given under oath, without cross-examination, and irrespective of all those precautionary rules by which competency and pertinency are tested." Nesbit, J., in *Mitchum v. State*, *supra*; Fowler, J., in *Tucker v. Henniker*, *supra*. See also *Baldwin's Appeal* (Conn.), 3 L. & Eq. Rep. 409.

Whether or not the verdict is so inadequate as to warrant us in setting it aside upon the motion, we have not considered it necessary to express an opinion. In actions of this nature, the principles upon which damages are assessed are very indefinite at best, and therefore very much is necessarily left to the good judgment and sound discretion of the jury. Hence, when, as in the case at bar, the testimony is conflicting on several points, courts are very reluctant to interfere with the verdict on the alleged ground of excessive or inadequate damages, except when it is so large or so small as to show that it is the result of perverse judgment or gross error, or that the jury had acted under undue motives or miscon-

ception. Therefore we do not pass upon the motion. But inasmuch as that part of the closing argument to which exceptions are alleged was clearly illegal and violative of the rights of the plaintiffs, and, urged by an experienced counsel of high character and acknowledged ability, must have necessarily had more or less influence upon the minds of the jury, notwithstanding the instruction of the presiding justice that the case must be settled from the sworn testimony, we think the exceptions must be sustained.

Exceptions sustained.

SUPERIOR COURT OF NEW HAMPSHIRE.

(To appear in 67 N. H.)

ASSESSMENT OF LAND DAMAGES. — RIGHTS OF CORPORATION AND LAND-OWNERS WHEN ROAD IMPROPERLY BUILT.

PERLEY v. B., C. & M. R. R. CO.

Damages assessed by the proper board for land taken by a railroad corporation are in full, and it is not open to the land-owner to prove that certain other causes of damage were not considered.

The land-owner is not to be prevented from the reasonable and prudent use of his land by reason of the improper construction of the railroad; and if, using his land in a reasonable and prudent manner, he suffers damage from such improper construction, he may recover his damages, notwithstanding such use of his land was subsequent to the construction of the railroad.

CASE, for injuries to the plaintiff's land and wharf on the Winnipiseogee River, below and adjoining the defendants' railroad. Trial before Stanley, J., and a jury.

The declaration contained four counts, the substance of which was that the plaintiff was the owner of a certain tract of land adjoining the railroad, on which he had erected a wharf, and that the defendants had improperly constructed their bridge over said river, so that the water thereof was diverted from its natural course, and turned upon the plaintiff's wharf, whereby it was washed out, undermined, and injured. Plea, the general issue, with a brief statement of the statute of limitations.

The facts sufficiently appear in the opinion. Verdict for the defendants. The questions arising upon certain instructions to the jury were transferred to this court.

Pike & Blodgett, and Stone, for the plaintiff.

Mugridge, Whipple, and Jewell & Smith, contra.

CUSHING, C. J. The charge of the court seems to me to have been, in most respects, an admirable statement of the relative rights and duties of the plaintiff and the defendants. There is, however, one part of the charge which is open to objection. The court told the jury, "that if no injury would have been occasioned to the plaintiff by the construction of the bridge by the defendants, in the manner in which it was constructed, if the plaintiff had not placed his wharf where he did place it, the de-

defendants were not liable; that the plaintiff had no right to take advantage of the acts of the defendants to their prejudice; that if the acts of the defendants were wrongful, and yet if the plaintiff would not have been injured if he had allowed his property to remain as it was before the wrongful acts of the defendants, the defendants are not liable; that if the construction of the wharf was the immediate cause of the damage complained of by the plaintiff, he cannot now recover damages therefor." The words "take advantage of" seem to imply an intention on the part of the plaintiff to build his wharf in such manner as to expose it to injury from the defendants' bridge, and if the charge went no further than this I should hold it to be correct; but I think the charge really does go further, to the extent of holding that the plaintiff, if he used his land for wharves, was to do so at his own peril; and that if using all reasonable care and skill in their erection, they should still be injured by the wrongful acts of the defendants in building their bridge, he would be without remedy. This was, I think, going too far.

If a town negligently suffers its highway to be insufficient, the traveller cannot, therefore, take advantage of that neglect by unreasonably exposing himself to danger; and if he do so, he will be without remedy. But if in the exercise of ordinary care and prudence, such as the circumstances of the case require, he suffer injury from the negligence of the town, he may recover.

So in this case, although the plaintiff could not take advantage of the wrongful acts of the defendants, still, if using reasonable care and skill in the erection of his wharf he should suffer injury by such wrongful act, I cannot see that it makes any difference that the plaintiff's erection was after and not before that wrongful act in point of time.

The court were requested by the plaintiff to give the following instructions:—

I. That it is immaterial whether or not the bridge was built before the wharf; that priority in use by either the plaintiff or the defendants would confer no right upon either to obstruct or divert the natural and accustomed channel of the river to the injury of the other.

II. That the plaintiff had the right to make a reasonable use of the river bank along his shores for any beneficial purpose he pleased, and a like right to the use of the water of the river, provided his use was not to the injury of the defendants.

These instructions were correct in themselves, and were calculated to qualify that part of the charge which has been found objectionable. If, however, that part of the charge had remained, I do not think that its effect would have been certainly removed by adding these instructions to the charge.

The next two requests were as follows:—

III. The defendants have not the right under their charter to divert or obstruct the natural current of the river to the injury of the plaintiff, unless such diversion was the natural and necessary consequence of the erection of a proper bridge across said river.

IV. That if in the erection of said bridge more piers were put in than was necessary, or if they were placed so as to divert or obstruct the natural current more than was necessary, or if the natural channel of the

river was unnecessarily obstructed or diverted by the defendants' embankments at either end of said bridge, the defendants did not make a reasonable and proper use of their rights if thereby the plaintiff had been injured.

These instructions were fully and completely contained in the charge, and I do not think, if given particularly, they would have added anything to its force. The legal position advanced in them — that *unnecessary obstructions were unreasonable* — could not have escaped the jury listening to the charge.

The fifth request was as follows : —

V. That if the defendants unreasonably diverted the natural current of the river upon the plaintiff's land, and such diversion was the proximate or substantial cause of injury to the plaintiff, they are liable, though other causes for which they are not in fault may have contributed to the injury.

This request was clearly objectionable, because it made no distinction between contributory negligence of the plaintiff and other contributing causes to the injury.

The sixth instruction requested was to the effect that if no damages were awarded for the wharf lot by the commissioners, and if the erection of the defendants' bridge has damaged the plaintiff in the beneficial use, occupation, or enjoyment of said lot, they are liable in this action for such damage, even though said bridge was constructed in a proper manner.

The court instructed the jury to the effect that the award of damages by the commissioners must be taken to be conclusive, and that no action can be maintained to recover further damages. This instruction is well supported by the following cases: *Aldrich v. Cheshire Railroad Co.* 21 N. H. 359; *Clarke v. Railroad*, 24 N. H. 114; *Dearborn v. Railroad*, 24 N. H. 179; and is directly in contradiction to the foregoing request, which, therefore, was rightly refused.

For the reasons above-stated the verdict must be set aside.

LADD, J. If the plaintiff had wantonly erected his wharf where he did, with the intention of exposing his property to destruction and bringing damage upon himself, in order that by so doing he might aggravate the consequences of the defendants' wrongful act in building their bridge in an improper or unsuitable manner, a different question would be presented. But it seems to me the charge does not bear that construction. It is true, the jury were told that the plaintiff had no right to take advantage of the acts of the defendants to their prejudice, which, taken by itself, looks somewhat in that direction, although it is not perhaps entirely clear what was meant by taking advantage of the defendants' acts to their prejudice. But the difficulty is, the jury were further told that if the defendants' acts were wrongful, nevertheless, if the plaintiff would not have been injured had he allowed his property to remain as it was before the wrongful acts of the defendants, the defendants were not liable. The effect of which was, to deprive the plaintiff of all right to make a reasonable and customary use of his property in order to protect the defendants against the natural consequences of their own illegal act. He must so use his own as not to receive injury from the miscon-

duct and wrong of his neighbor. This is not only an inversion of the rule *Sic utere tuo ut alienum non lædas*, but it adds the extraordinary mandate that you shall not use your own at all, if by so doing you incur a liability to be injured by the trespass or other wrongful act of another.

Some remarks of Beardsley, J., in *Cook v. The Champlain Transportation Co.* 1 Den. 91, 100, 101, are so pertinent that I quote them: "It would be a startling principle indeed that a building, placed in an exposed position on one's own land, is beyond the protection of the law; and yet it comes to this result upon the argument urged in this case. A land-owner builds immediately on the line of a railroad, as he has an unquestionable right to do; it may be an act of great imprudence, but in no sense is it illegal. Is he remediless if his house is set on fire by the sheer negligence of an engineer in conducting his engine over the railway? . . . The owner of a lot builds upon it, although in close proximity to the shop of a smith. The house is more exposed than it would be at a greater distance from the shop: but is this to exempt the smith from the obligation of care, and to screen him from the consequences of his own negligence?" Several other apt illustrations are given, and the learned judge concludes: "We may run through every imaginable variety of position, some of more and some of less exposure and hazard, and we must at last, I think, come to the conclusion that, while a person confines himself to a lawful employment on his own premises, his position, however injudicious and imprudent it may be, is not therefore wrongful; and that his want of due care and judgment in its selection can never amount to negligence, so as thereby to deprive him of redress for wrongs done to him by others."

I think it is impossible to sustain this part of the charge, and that for this reason the verdict must be set aside.

The ruling, that the award of the commissioners must be held to cover all damages which would result to the plaintiff from a suitable and proper construction of the railroad across his lands, was correct.

As to the requests, some of them seem to be quite unobjectionable; but at the same time, with the exception already pointed out, the charge appears to cover the whole ground, and to include everything in the requests that was germane, or called for by the facts in the case.

SMITH, J. Under the instructions given, the jury may have found that the defendants did not construct their bridge in a suitable manner, and that the plaintiff's wharf was properly constructed. The instructions denied to the plaintiff the right to make a lawful use of his land except at his own risk, if he would thereby receive injury from the defendants' bridge, although improperly constructed. That they were erroneous in this particular it seems to me cannot admit of doubt for reasons more fully explained by my brethren, and which need not be repeated.

If the defendants properly constructed and maintained their bridge, and if the necessary result of the plaintiff's constructing his wharf was that the damages which did happen to him would have happened, the defendants are not liable, because it must be considered that all that was taken into the account and considered in the original award of damages; and the instructions on this part of the case were therefore correct.

The instructions to the jury in other respects were correct,—just what were called for by the facts appearing in the evidence, and admirably calculated to aid the jury in gaining a clear apprehension of the law applicable to the case. They covered the special instructions requested by the plaintiff, so far as they were called for. But for error in the instructions, as above explained, the verdict must be set aside, and

A new trial granted.

SUPREME COURT OF OHIO.

(To appear in 29 Ohio St.)

RAILROAD.—INJURY TO STRANGER BY FALLING OF STATION-HOUSE.— NEGLECT.

PITTSBURG, FT. WAYNE & CHICAGO RAILWAY CO. v. BINGHAM.

A railroad company is not liable for an injury to a person resulting from its failure to exercise ordinary skill and care in the erection or maintenance of its station-house, where, at the time of receiving the injury, such person was at such station-house by mere permission and sufferance, and not for the purpose of transacting any business with the company or its agents, or on any business connected with the operation of the road.

THE original action was brought by the defendant in error as the personal representative of her deceased husband, Wallace B. Bingham, against the plaintiff in error, under the act requiring compensation to be made for causing death by a wrongful act, neglect, or default, passed March 25, 1851. 2 S. & C. 1139.

The deceased was at the plaintiff's station-house in Massillon, on December 5, 1870, and while there was struck by a portion of its roof, torn off by wind, and blown, during a violent storm, from the building, with such force against and upon him as to cause his death. The plaintiffs in error—one the owner of, and the other the lessee operating the railroad—were charged with the wrongful act and neglect alleged to have resulted in the death of Bingham, consisting in negligence in the construction and maintenance of said station-house; the plaintiff below claiming it to have been defectively and unskilfully constructed, and maintained and used in an unsafe and insecure condition.

Issue was joined upon the question of negligence, and the cause submitted to a jury. Upon the trial, evidence was given which tended to show that the deceased, on the day, and at the time of receiving the injury resulting in death, was at said passenger depot or station-house, not for the purpose of transacting any business with the company, its agents, or servants, or with any one rightfully there, nor on business in anywise connected with the operation of the road; but being out of employment was there for pastime or pleasure, or as a place of safety during the continuance of what appears to have been a violent storm. After the testi-

mony was concluded, the court instructed the jury, in substance, that if the deceased was at, in, or near said depot, not on any business, but "was there by the tacit permission of, and without objection from," the company operating the road, "its agents, or servants, and there peaceably and innocently, relying upon such station-house as a place of security," and was free from negligence contributing to his injury and consequent death, and ordinary care and skill were not employed in the construction and maintenance of the station-house, but from want of such care and skill it was defectively and insufficiently constructed, and imprudently and negligently maintained and used, and by reason thereof the deceased lost his life, the company was liable. The defendant below excepted to that part of the charge that held it to be the duty of the company to have exercised due care in the construction and maintenance of the building, if the deceased entered and was there by "mere permission and without objection;" and from a judgment against it, carried the cause to the district court, where the judgment of the common pleas was affirmed. A petition in error is now prosecuted here to reverse both judgments. Only so much of what occurred at the trial is stated as is necessary to show the relevancy of the question considered and decided.

J. T. Brooks, for plaintiff in error: The duty upon the part of the defendants to exercise care toward the plaintiff depended upon the question whether the plaintiff was in the exercise of a legal right at the time of the injury. And it made no difference that he may have been there by the *silent permission* or *license* of the defendants. If he was not there by legal right, he took the premises *as he found them*, with all the concomitant perils. *Sweeny v. Old Colony, &c. Railroad Company*, 10 Allen, 868, 372; 1 Red. on Railways, 474, sec. 126, par. 15; *Zoebis v. Tarbell*, 10 Allen, 385; *Griffiths v. L. & N. W. R. R. Co.* 14 Law Times (N. S.), 797; S. & R. on Neg. sec. 447 and notes; *Bancroft v. B. & W. R. R. Co.* 97 Mass. 275; Wharton on Neg. sec. 352; *Gillis v. Penn. R. R. Co.* 8 Am. Law Reg. (N. S.) 729; 59 Penn. St. 129; 22 How. (U. S.) 461; 24 Ib. 307; 2 Curtis C. C. 141; 9 Wall. 146; 2 Har. 481; 3 Blatch. C. C. 37, 276, 517; 14 N. H. 307; S. & R. on Neg. secs. 308-310; *Kay v. Penn. R. R. Co.* 65 Penn. St. 269.

W. A. Lynch, for defendant in error. Did the court err in permitting a recovery if the jury found Bingham at the depot by the tacit permission of, and without objection from, the defendant, the Pennsylvania Railroad Company, its servants, or agents, if there peaceably and innocently, relying upon such station-house as a place of security.

The whole argument turns on the question: Did the company owe any duty to any one at the depot, as supposed by the proposition above stated? It is claimed that it owed to such a one no duty, and therefore negligence cannot be alleged. I admit there is, in such case, no duty depending on contract, or growing out of any special relation or privity between the parties; but the law recognizes many duties of property-owners independent of such relation or privity. *Callahan v. Warne*, 40 Mo. 135; *Johnson v. Patterson*, 14 Conn. 1; *Kerwhacker v. R. R. Co.* 3 Ohio St. 172; 65 Penn. St. 269; *Young v. Harvey*, 16 Ind. 314; 44 Penn. St. 375; 7 Met. 602; 1 Duer, 571; 66 Penn. St. 345; *Baker v. Portland*, 58

Me. 199; *Spofford v. Horton*, 3 Allen, 176; *Welch v. Wesson*, 6 Gray, 505; *Steele v. Burkhardt*, 104 Mass. 59; *Kearns v. Lowdon*, 1b. 63; *Hall v. Corcoran*, 107 Mass. 251; *Sutton v. Wanwatos*, 29 Wis. 21.

BOYNTON, J. We find in the record of the present case among the questions argued but one deserving consideration; and that one may be stated as follows:—

“Is a railroad company bound to exercise ordinary care and skill in the erection, structure, or maintenance of its station-house or houses, as to persons who enter or are at the same, not on any business with the company or its agents, nor on any business connected with the operation of its road; but are there without objection by the company and therefore by its mere sufferance or permission?” We must give to this question a negative answer. A careful examination of the adjudged cases bearing on the point has led to the discovery of none supporting, much less sustaining, the proposition contended for by the defendant in error. The question in its legal bearings is kindred to the one decided and settled in a class of cases, of which *Hounsell v. Smith*, 7 C. B. N. S. 731, is an example. In that case the plaintiff fell into a quarry left open and unguarded on the unclosed waste lands of the defendant, over which the public were permitted to travel. In an action for the injury, it was held that the owner was under no legal duty or obligation to fence or guard the excavation, unless it was so near to a public road or way as to render it dangerous to travel thereon. The court say: “The person so travelling over such waste lands must take the permission with its concomitant conditions, and, it may be, perils.” That an owner is not liable for an injury from pitfalls or excavations to one who enters his premises uninvited, and by mere license or permission, is well sustained by the authorities. 3 Best & Sm. 244; *Hardcastle v. The South Yorkshire Ry. Co.* 4 Hurlst. & N. 67; *Sweeny v. Old Colony & Newport R. R. Co.* 10 Allen, 372; *Knight v. Abert*, 6 Barr, 472; Roscoe’s Ev. at Nisi Prius, 719. In *Southcote v. Stanly*, 1 Hurlst. & N. 247, L. J. 25 Ex. 339, a visitor at defendant’s house was injured by the falling of a glass door, through the negligence of the defendant. It was held that the plaintiff having, *pro hac vice*, become an inmate of the defendant’s family, a rule similar to that of fellow-servants applied. In *Peirce v. Whitcomb*, 48 Vt. 127, plaintiff and defendant went to defendant’s barn, at night, to measure up some oats, which the defendant sold to the plaintiff for the latter’s accommodation, having none he wished to sell. While the defendant was looking for a measure, the plaintiff, walking about the barn in the dark, fell through a hole in the floor, and was injured. It was held he could not recover.

But if such dangerous place or pitfall or excavation is by the side of a public road or footway, along or over which the public have the right, and are accustomed to travel, it becomes the duty of the owner to adopt suitable and reasonable precautions to guard the public against injury resulting from the proximity of such dangerous place to the highway thus rightfully enjoyed. *Barnes v. Ward*, 67 Eng. C. L. 393; *Firmstone v. Wherley*, 2 D. & L. 208, Pollock, B.; *Corby v. Hill*, 4 C. B. N. S. 556; *Hargreaves v. Deacon*, 25 Mich. 5; *Young v. Harvey*, 16 Ind. 314; *Mullen v. St. John*, 57 N. Y. 567. Or, if a structure is erected near the line

of another's land, and falls over on it to his injury, the owner of the structure is liable. *Schwartz v. Gilmore*, 45 Ill. 455; Shearm. & Redf. on Neg. par. 498.

The principle underlying the cases above cited recognizes the right of the owner of real property to the exclusive use and enjoyment of the same without liability to others for injuries occasioned by its unsafe condition, where the person receiving the injury was not in or near the place of danger by lawful right; and where such owner assumed no responsibility for his safety by inviting him there, without giving him notice of the existence or imminence of the peril to be avoided. In such cases the maxim, *Sic utere tuo ut alienum non lædas*, is in no sense infringed. In its just legal sense it means, "So use your own property as not to injure the rights of another." Where no right has been invaded, although one may have injured another, no liability has been incurred. Any other rule would be manifestly wrong.

Actionable negligence exists only where the one whose act causes or occasions the injury owes to the injured person a duty, created either by contract or by operation of law, which he has failed to discharge. In *Burdick v. Cheadle*, 26 Ohio St. 393, the owner of a store building had leased it to a tenant, who was in the occupancy of the same, selling goods therein. Certain shelvings and fixtures not properly secured fell, and injured the plaintiff, a customer of the tenant, for which injury the customer brought an action against the landlord. It was said by McIlvaine, J., that there was no privity between the owner of the property and the plaintiff, and that the former owed no duty to the latter which was violated by a careless construction or fastening of the fixtures; and that the fact that the room was to be kept open to the customers of the tenant did not affect the question.

But the question naturally arises, to what extent does the right of a railroad company to the control and use of its real property differ from that of a general owner of land not burdened or incumbered with a public charge? What restrictions and limitations are imposed upon the use and enjoyment of the real property of the company that do not exist in the case of the ownership of property not employed for public purposes? These questions are not difficult to answer. The right of the possession and control of the property of a railroad corporation for all purposes contemplated by its charter, and to enable it to accomplish the objects for which it was created, is indispensable to the proper discharge of the duties it owes to the public. By accepting a grant of corporate power from the state, it bound itself to do and perform certain things conducive to the public welfare. And those things consist principally in the duty to carry and transport persons and property from one point on its road to another, under such reasonable rules and regulations as it may prescribe to itself, or as may be prescribed by more general law. The obligation to carry, thus assumed, cannot be disregarded or rejected at pleasure. It is an indispensable condition to the right to exercise corporate functions. The duty to carry is correlative to the existence of the corporate power of the company, and ceases only with a surrender of its corporate privileges. It is, therefore, a right that the public have to enter upon the premises of the company, at points designed or designated for receiving

passengers, and upon compliance with the rules governing the transportation of persons to be carried over its road to such points thereon as they may desire. The right of the public to enter is coextensive with the duty of the company to receive and carry. It, however, cannot be extended beyond this. For all purposes not connected with the operation of its road, the right of the company to the exclusive use and enjoyment of the corporate property is as perfect and absolute as is that of an owner of real property not burdened with public or private easements or servitudes.

The case of *Nicholson, Administratrix, v. The Erie Railway Co.* 41 N. Y. 525, rests upon this principle. The company had left on a branch track four empty cars and one loaded one. The brakes to the four cars were not set or secured, and they were started by a violent wind and ran against the loaded car, propelling it forward and causing it to run against and over the plaintiff's intestate, who was upon the track, killing him. The place where the branch track was constructed was open and unfenced, and was customarily used by the people in the vicinity as they had occasion to use it, without objection by the company. The court instructed the jury that it was the duty of the company to set the brakes, and that if it left the cars without doing so, or otherwise securing them, it was a violation of duty on its part. This instruction was held erroneous. It is said in the opinion that no relation existed between the company and the deceased creating any particular duty, and that the company "had the same unqualified right, which every owner of property has, to do with his own as he pleases, and keep it and use it where and as he pleases, on his own ground, up to the point when such use becomes a nuisance.

It is doubtless true that a railroad company, by erecting station-houses and opening them to the public, impliedly license all persons to enter. But it is equally true that such license is revocable at the pleasure of the company as to all persons who are not there on business connected with the road, or with its servants or agents. *Commonwealth v. Powers*, 7 Met. 596; *Nicholson v. The Erie Railway Company*, *supra*, 582. In *Harris v. Stevens*, 31 Vt. 90, it is said: "The right to enter (a depot) and remain exists only by virtue of, and as incident to, the right to go upon the train, and it is to be extended so far only as is reasonably necessary to secure to the traveller the full and perfect exercise and enjoyment of his right to be carried upon the cars." An implied license to enter a depot creates no additional duty upon the part of the company as respects the safety of the building entered. Its only effect is to make that lawful, which, without it, would be unlawful. *Wood v. Leadbitter*, 13 M. & W. 888. It is a waiver or relinquishment of the right to treat him who has entered as a trespasser.

In *Sweeny v. Old Colony & Newport Railroad Company*, 10 Allen, 372, the court say: "A licensee, who enters on premises by permission only, without any enticement, allurement, or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls. He goes at his own risk, and enjoys the license subject to its concomitant perils." "No duty is imposed by law on the owner or occupant to keep his premises in a suitable condition for

those who come there solely for their own convenience or pleasure, and who are not expressly invited to enter, or induced to come upon them by the purpose for which the premises are appropriated or occupied." The inducement here spoken of must be equivalent to an invitation to enter. *Carlton v. Franconia Iron & Steel Co.* 99 Mass. 216. Mere permission is neither inducement, allurements, nor enticement.

The case of *Tobin v. The P., S. & P. R. R. Co.* 59 Maine, 188, cited by defendant's counsel, instead of supporting the defendant's claim, sustains the opposite. The plaintiff was a hackman, carrying passengers to the cars, and while stepping from his carriage to the platform was injured by a defect in the latter, occasioned by a want of ordinary care in the company. A recovery was sustained, on the ground that a "hackman carrying passengers to the railroad depot for transportation, and aiding them to alight upon the platform of the company, is as rightfully upon the same as the passengers alighting."

A recovery was also sustained in *Toledo, Wabash & Western Railway Co. v. Grush*, 67 Ill. 262, for an injury to the defendant, resulting from stepping accidentally through a hole in the platform, carelessly left open, the defendant being at the depot looking for freight belonging to his employer. The case of *Gillis v. Pennsylvania Railroad Co.* 59 Penn. St. 129, fully sustains the position and claim of the plaintiffs. It was there held that the platform of a railroad company, at its station, is in no sense a public highway; that it is not dedicated to public use; that it is for the accommodation of passengers; but, being uninclosed, persons have the privilege, but not the legal right, of walking over it for other purposes; and that "the owner is not liable to a trespasser, or one who is on his property by mere permission or sufferance, for negligence of himself or agents." Applying the principle thus settled to the present case, it leaves but little doubt that the court was in error in holding the company to such a measure of care, or to such a rule of responsibility. In the circumstance supposed — the presence of the deceased at the depot by the mere sufferance or permission of the company — it was under no legal obligation to protect him from danger, not known to exist, although the unsafe condition of the building that gave rise to such danger was a consequence of a failure to exercise ordinary care, prudence, and skill in its structure or in its maintenance. *Carlton v. Franconia Iron & Steel Co.* 99 Mass., *supra*.

His presence at the depot was uninvited, and the company did not owe to him the duty to keep its station-house in a safe and secure condition. Its negligence, if any, was necessarily negligence of omission, negligence in having omitted the exercise of ordinary care to ascertain the dangerous character of the building. If the question was between the company and its employees, whose duty it was to occupy the building, or if it arose between the company and those who came to take passage on its cars, or to accompany a friend about to depart, or to await the arrival of one expected, or to engage in any business connected with the operation of the road, or business with those engaged in its service and having a legal right to be and remain there; or, if the company had possessed knowledge, in fact, of the dangerous character or condition of the building, and gave no notice thereof to those it permitted to enter or occupy, other con-

siderations would arise. It, however, is not charged with intentional wrong, nor with that gross or reckless misconduct that is difficult to distinguish from it, and therefore is equivalent to it. All it could have done, when the storm approached, to save the deceased from harm, was to see that he left the building, and thereby escaped the danger. This was not a legal duty. He was injured by no act of the company, or its servants or agents, occurring at the time. The fault was of past origin, and negative in character, consisting in not previously overhauling the building, ascertaining its defects and weakness, and supplying the needed strength and support. For this omission, or its resulting consequences, a stranger has no right to call it to account.

Judgment of the district court and of the common pleas reversed, and cause remanded.¹

¹ The case of *Pittsburg, Ft. Wayne & Chicago Railway Co. and Pennsylvania Railroad Co. v. Brigham*, to be reported, also, in 29 Ohio St., was as follows:—

On the 5th of December, 1870, a violent storm blew down part of the roof of the Massillon station-house, belonging to the Pittsburg, Ft. Wayne, and Chicago Railway Company, and Brigham was seriously injured by the falling materials. At the time of the occurrence the Pennsylvania Railroad Company was operating the road, and using the building, as lessee under the first-named company, under the statute which makes the lessor company equally liable with the lessee for injuries occasioned in using and operating the road. Brigham brought his action against both companies, charging the lessor company with negligence in not constructing and securing the roof of the building in a proper and substantial manner, and the lessee company with negligence in maintaining and using it in its insecure condition. The negligence was denied by both companies, and the cause was tried to a jury, who returned a verdict for the plaintiff. A motion for a new trial, on the ground that the verdict was against the law and the evidence, was overruled by the court, and judgment was entered upon the verdict. This judgment was subsequently affirmed in the district court, and the plaintiff in error sought to reverse the judgments of both courts.

A bill of exceptions, embodying all the testimony, forms part of the record. From this it appears that the roof in question had stood eighteen years at the time of its fall, and there was a conflict of testimony as to whether it was constructed on a proper plan and properly fastened for the purpose of resisting storms—some eight or ten experts testifying in the affirmative and some four or five in the negative. There was also a conflict of testimony as to the severity of the storm, as compared with other storms which had previously occurred in the locality.

At the close of the testimony the defendants requested the court to instruct the jury that if the roof of the station-house, at the time of the accident, was of sufficient construction and

strength to withstand the ordinary and common storms of the locality the defendants were not liable; that the defendants were not bound to foresee and provide against extraordinary storms; and that they were not liable unless they had failed to use that care which prudent men ordinarily employ in such matters.

These instructions the court refused to give as requested, and instead thereof gave the following:—

"The defendants were guilty of negligence if they failed, in constructing or maintaining said station-house, to use that degree of care which a man of ordinary prudence is accustomed to employ in constructing or maintaining a building for his own use for the same or like purposes, to guard against danger from storms of wind, which might reasonably have been anticipated. If they used that care, they were not negligent, and cannot be held liable, although they are corporations.

"And further, you must find that the storm which caused the injury was not unprecedented in that locality, but was of such character that it might reasonably have been expected to occur at that place.

"The defendants were bound to provide against storms which could reasonably have been anticipated, though likely to occur but rarely.

"But defendants were not bound to provide against a storm of wind so extraordinary in power that no experience could have anticipated its occurrence. And if the storm in question was of this character, the plaintiff cannot recover."

This instruction of the court, it is now claimed, was erroneous. There are also various other grounds of error alleged, but it is not necessary to state them as they were not passed upon by the court.

WELCH, C. J. . . . If the defendants, in the construction and maintenance of the building, used that degree of care which men of ordinary prudence are accustomed to employ in like business, they were not liable. Had the court stopped with this proposition there clearly would have been no error in the charge. But the court went further, and told the jury that

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

(To appear in 131 Mass.)

CRIMINAL LAW. — LARCENY. — CORPORATION. — EVIDENCE. — PRACTICE.

COMMONWEALTH v. WHITMAN.

In a criminal case, a witness, who testifies to the doing of the act charged against the defendant, may be asked who the person was who did it, and no exception lies to the admission of his answer, "That man," pointing to the defendant.

On an indictment for larceny, the evidence tended to prove that a boy was sent to the office of A. with money for him; that he found B. in the office, who, on being asked, said he was not A., and that he was going to stay until A. came in; and that the boy handed the money to B., on his signing a receipt therefor, which he did in the name of A. by C., signing a false name instead of his own. The defendant asked the judge to rule that "to constitute larceny, there must be an appreciative act of personation, and that if B. said he was not A., there was no larceny." The judge gave this instruction, with the addition, "unless B. held out some inducement to the boy to lead him to believe that he had the right to sign the receipt and receive the money for A." *Held*, that the defendant had no ground of exception.

On the trial of an indictment for larceny, there was evidence identifying the prisoner as the person who had committed the act at the office of A., by a boy who was sent to that office with a receipt for A. to sign. On the receipt was written "twenty minutes past two," denoting the time when the boy started on his errand. A witness for the government, who had an office in the same building as A., testified that at about thirteen minutes to two o'clock he passed the door of A.'s office and saw the prisoner there alone. *Held*, that the defendant had no ground of exception to the admission of this evidence; and that the government, by putting the receipt into the case, was not bound to concede that the interview between the prisoner and the boy was after twenty-two minutes past two o'clock.

At the trial of an indictment for larceny, it appeared that a boy was sent to an office with a package, and that a man in the office took the package and signed a receipt for it. The government offered in evidence a receipt for a watch, admitted to be signed by the defendant. The judge instructed the jury that "the only legitimate use of the watch receipt was for the comparison of hands, and if the jury believed that the same person wrote the watch receipt and the name attached to the receipt which the boy took, it was evidence tending to show that the man who was in the office, of whom the boy testified, was the defendant." *Held*, that the defendant had no ground of exception.

At the trial of an indictment for larceny, alleging the property stolen to be in "the District Telegraph Company, a corporation duly established by law," it appeared that the District Telegraph Company, a corporation organized under the general law of New York for the incorporation of telegraph companies, received a package of money to deliver, and sent a boy to make the delivery. The government put in evidence a copy of the Statutes of New York, containing this general law, and also an attested copy of the articles of association, under which the company was organized,

the defendants were bound to provide against all storms which could reasonably have been anticipated, and by plain implication told them that the defendants were bound to provide against all storms that were not "unprecedented," or that were of a kind that had ever happened within the range of human "experience." Taken by itself, this latter part of the charge is clearly erroneous, and in conflict with the rule at first, and, as we think, correctly laid down by the court. The whole charge, taken together, to say the least, was

calculated to mislead the jury. Two rules, apparently in conflict with each other, were laid down for their guidance, and it is impossible to know which they followed. The general custom of prudent persons in such cases, and not the absolute requirements of the occasion, is the true standard by which the defendants should be tried. They were only bound to come up to the fair average of careful and prudent men.

Judgment reversed, and cause remanded.

from the office of the secretary of state of New York, where the law required the original to be deposited. It appeared that the company had undertaken to do business in the city of Boston under its New York organization, by delivering messages, and that this boy was one of its messengers. The judge instructed the jury "that the court was not bound to say whether the company had or had not authority to do business under its New York charter in the city of Boston; but that if the jury found that it was incorporated under the law of New York as the District Telegraph Company, and attempted to do business here under its organization, and received this money and undertook to deliver it through this boy, as its agent, then it might be considered as having special ownership in this property, which would be sufficient under this indictment." Held, that the evidence was rightly admitted, and that the defendant had no ground of exception to this instruction.

INDICTMENT in two counts for larceny: the first charging the ownership of the property as being in "the District Telegraph Company, a corporation duly established by law;" and the second, as being in George G. Drew. Trial in the superior court, before Putnam, J., who allowed a bill of exceptions in substance as follows:—

At the close of the whole evidence, and before the arguments to the jury, the attorney for the commonwealth elected to go to the jury upon the first count.

The evidence for the government tended to show that George G. Drew, a constable of the city of Boston, had an office in Joy's Building, on the second floor of the building, at the head of the first flight of stairs in the rear; that he had an execution against one Lowe, for collection, amounting to \$40.65; that on April 19, 1876, the day named in the indictment, Lowe summoned a messenger boy, employed by the District Telegraph Company, to take the money to the office of Drew; that he put the money in an envelope directed to Drew, and gave it to the boy, together with a small package of cigars, the envelope being put under the string which was around the package; and that the boy started from the telegraph office, with the envelope and a receipt for the money handed him by the cashier, which he was to have signed, and proceeded to the office of Drew, in Joy's Building. He was then asked by the attorney for the government, "Was there any one in the office?" The witness answered, "Yes." He was then asked, "Who was it?" The witness answered, "That man," pointing to the defendant. To these questions and answers the defendant objected, but the judge admitted them.

The witness then testified that he asked the man if he was G. G. Drew; that he said, "No;" that he asked him "when he would be in;" that he replied, "He would be in soon, right in;" that he asked him "if he was going to stay till Drew came in," to which he replied, "Yes;" that he then laid down the envelope on the table, took out the receipt, and asked him "if he would sign it;" and that he signed it with a pencil, "G. G. Drew, by George Jones." The receipt had all been filled in, ready for the signature, before it left the telegraph office. This evidence as to asking him to sign the receipt, and the signing of it, and the paper itself, was objected to by the defendant, but the judge admitted it. The witness was also asked, "Did the signing of the receipt have anything to do with your leaving the package?" This question was objected to, but the judge admitted it, and the boy answered, "Yes. I should not have left the package, if I had not got the receipt."

The government contended that the boy had been induced to part with the package by reason of some trick or artifice, or some inducement held out by the defendant, to lead the boy to believe that he had the right to sign the receipt, and receive the package. Upon this part of the case, the defendant asked the judge to rule as follows: "To constitute larceny by falsely personating or representing another, there must be an appreciative act of personation or representation. If the man who was in Drew's office when the boy left the package (whoever he was) made no representation that he was Drew, but distinctly told him that he was not Drew, then there was no larceny." The judge gave this ruling, with this addition, "unless the man held out some inducement to the boy to lead him to believe that he had the right to sign the receipt and receive the package for Drew." The judge further, in charging the jury on this part of the case, said that the jury must find that these inducements were held out for the purpose of obtaining the package, the party offering them having the guilty purpose at the time to convert the property to his own use, and afterwards did so convert it, and also that the boy was led to part with the possession of the property solely by reason of said inducements; to which instruction no exception was taken.

The boy testified that when he left the office of the District Telegraph Company he took with him a written receipt, filled up except the signature. The date, twenty two minutes past two, on the receipt, was the hour at which he left the telegraph office, as marked by the cashier. One Howard testified that he had an office in Joy's Building, No. 12; that on April 19, about quarter to two o'clock, he left his office to go to Pemberton Square. He was asked, "When you went out of your office, did you see Whitman?" This question was objected to by the defendant, on the ground that the time fixed by the telegraph company as the time when the boy left the office with the money was twenty-two minutes past two. The judge admitted the testimony. The witness stated that as he passed the door of Drew's office, at about thirteen minutes to two o'clock, he saw the defendant in Drew's office alone, the door being opened as he passed. As he went along Court Street to Pemberton Square he saw the time by the Advertiser's clock, and it was then ten or eleven minutes to two o'clock. On this point in the case, the defendant asked the judge to rule as follows: "The whole of the receipt must be taken as true, so far as the government case is concerned. The time named therein must be assumed by the jury as correct, and the government must be held to concede that the transaction at Drew's office, whoever was the man there, was subsequent to that time, twenty-two minutes past two." The judge declined to give this ruling.

The government offered in evidence a receipt for a watch, written in ink, signed by the defendant, which he admitted to be his handwriting. The government then proposed to exhibit it to the jury for the purpose of comparison of hands, contending that the same person who wrote the paper writing also wrote the signature to the receipt which was handed to the boy. To the admission of this paper, for the purpose of comparison of hands, the defendant objected, but the judge admitted it, under exception. On this part of the case the defendant asked the judge to instruct the jury as follows: "The only legitimate use of the watch receipt,

in this case, is a confirmation of the testimony of the boy. If the jury, independently of the receipt, discredit the boy as to identity, then the receipt has no office in the case, and should be set out of consideration by the jury in the balance of the proofs." The judge gave this instruction, with this addition, by way of explanation: "The only legitimate use of the watch receipt is for the comparison of hands; and if the jury believe that the same person wrote the receipt and the name attached to the receipt which the boy took, it is evidence tending to show that the man who was in the office, of whom the boy testified, was the defendant."

Drew testified that about ten minutes to two o'clock he left his office to go down cellar; that he left no person there; that he was gone some three or four minutes; that on his return he found nobody there, but found a small package of cigars lying on the table, which were not there when he went out; that just before he went down cellar, the defendant, whom he said he knew, came up-stairs, looked into his door, caught his eye and went away out of his sight, but did not go up-stairs or down-stairs. The defendant asked the judge to instruct the jury, "that Drew's testimony as to seeing the defendant in the entry was not in law confirmative of the boy or of Howard, especially when he fixes his time as earlier than ten minutes of two o'clock." The judge gave this instruction, with this addition: "The only effect of Drew's testimony on this point is to show that Whitman was in the entry about the time when, from Drew's testimony, the money must have been left in his office; and that this fact was only a circumstance, the weight of which it was for the jury to determine."

It appeared that the District Telegraph Company was organized under the general law of New York for the incorporation of telegraph companies. The government offered in evidence a printed book, purporting to contain the statutes of the State of New York, and proposed to put it in the case. This book contained the general law above referred to, tit. 19, § 1, and purported to be published under the authority of the secretary of state of New York.

The defendant objected to the admission of the evidence; but the judge admitted it. The government then offered a copy of the articles of association under which the telegraph company was organized. The copy was an attested copy from the office of the secretary of state of New York, in which office the law required that the original should be deposited. There was no evidence by the witness who witnessed it. The defendant objected to the admission of this as evidence, but the judge admitted it. No other evidence was offered in reference to the corporation, or its authority to act in this state; but it appeared that it had undertaken to do business in the city of Boston under its New York organization by delivering messages from place to place; and that this boy was one of their messengers. The defendant asked the judge to instruct the jury as follows: "If the jury find that the District Telegraph Company was chartered in New York, it would have no power and no authority to carry on business in this state, and in the city of Boston, until it had recorded a copy of the certificate in this state; and, not having authority here to do the business, it could not in law make the telegraph boy the agent of the District Telegraph Company, and this money would not be the prop-

erty of that company, nor would it be in its possession while in the boy's hands."

The judge declined to give this instruction; but did instruct the jury, "that the court was not bound to say whether the company had or had not authority to do business under its New York charter, in the city of Boston; but that, if the jury found that it was incorporated, under the law of New York, as the District Telegraph Company, and attempted to do business here under its organization, and received this money and undertook to deliver it through this boy, as its agent, then it might be considered as having special ownership in this property, which would be sufficient under this indictment." At the end of the government's case, the defendant moved the judge to order a verdict for the defendant, on the count which alleged the ownership of the property to be in the District Telegraph Company, on the ground that there was no evidence of its capacity to own the property named, or its ownership thereof. The judge declined so to order. The defendant made a like motion as to the other count, on the ground that there was no evidence to show ownership or custody of the property in Drew, but the judge overruled the motion.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

G. W. Searle, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

THE COURT

Overruled the exceptions.

SUPREME COURT OF OHIO.

(To appear in 29 Ohio St.)

ASSIGNMENT BY ONE MEMBER OF FORMER FIRM. — RATIFICATION. — ATTACHMENT, ETC.

HOLLAND v. DRAKE.

1. One of the members of an insolvent firm cannot, either before or after dissolution of the partnership, make a valid assignment of all its effects for the benefit of creditors, against the will of a copartner, or without his assent when he is present or accessible.
2. Where an assignment is so made against the will of the non-executing partner, or when he is present and not assenting, and he subsequently ratifies the assignment, the ratification will relate back to the time of executing the assignment, and give it effect from that date; but not so as to defeat the rights of third persons, acquired in good faith in the mean time.
3. Where in such a case an attachment had been levied upon the property, between the date of the assignment and its ratification, and by agreement between the attaching creditor, the assignee, and the partners, the property was delivered by the sheriff to the assignee, to be by him sold in place of the sheriff, and the proceeds to stand in place of the property, and be applied to the attaching creditor's judgment when obtained, if the court should hold the attachment good; in an action by the attaching creditor against the assignee and the partners, to have the proceeds of the property so applied: *Held*, that the defendants were estopped from setting up as a defence that the lien of the attachment was lost by delivery of the property to the assignee under said agreement.
4. In such action it was not necessary to make the partnership creditors parties defendant.

TRACY and McKay were partners in the "grain and feed business," in the city of Cleveland, Tracy being the active and managing member. On the 13th of December, 1867, the firm then being insolvent, McKay caused a notice of the dissolution of the partnership to be published in the city papers; and afterward, on the 20th of the same month, he executed to J. M. Drake, and filed in the probate court, a general assignment of the property and effects of the company, for the benefit of all its creditors. On the last named day, but subsequently to the execution and filing of the assignment, Holland and Pettitt caused part of the property so assigned to be seized upon an attachment issued in an action which they had lately brought against the firm, and in which they afterward recovered judgment. Prior to the execution of the assignment Drake had consented to act as such assignee, but the assignment was not in fact delivered to him, or he made aware of its existence, until some days after the levy of the attachment; but, when notified thereof, he accepted the same, and qualified as such trustee. At the time McKay executed the assignment, his copartner, Tracy, was in the city, but was not consulted, and when informed by McKay of its execution, refused to assent, and he did not assent until some time after the levy of the attachment. By mutual agreement between the parties interested, Holland and Pettitt, Drake and McKay, the attached property was then delivered by the sheriff to Drake, as assignee, "to be sold by him instead of the sheriff," and the proceeds to "stand in place of the property and be applied in payment of Pettitt and Holland's judgment, in case the court should hold the attachment a good lien."

The assignee sold the property in pursuance of this agreement, and brought the money into the probate court, and Holland and Pettitt filed their petition therein against Drake, McKay, and Tracy, asking to have the money adjudged and paid to them, in preference of the other creditors. On hearing of this petition it was dismissed, the probate court holding that the assignment had precedence of the attachment, and that the fund should be distributed *pro rata* among all the creditors. On proceedings in error this judgment was affirmed in the common pleas, and Holland and Pettitt having filed a petition in error in the district court to reverse the judgment of affirmance, the case was reserved for decision here.

Estep & Burke, for plaintiff in error. The important question in this case is whether one partner, against the refusal of his copartner to join therein, can make a valid assignment of the partnership assets, to a trustee of his own selection?

We maintain he cannot, and refer to the following authorities: Burrill on Assignments, 43-65, inclusive; *Harrison v. Sterry*, 5 Cranch, 289; *Pearpont v. Graham*, 4 Wash. C. C. 232; *Deckert v. Gilbert*, 4 Watts & Serg. 454; *Kirby v. Ingersoll*, 1 Harrington, 172; *Hughes v. Ellison*, 5 Mo. 463; *Drake v. Rogers*, 6 Mo. 317; *Dana v. Lull*, 17 Vt. 390; *Deming v. Colt*, 3 Sandf. 284; 2 Ib. 292; *Hayes v. Heyer*, 2 Ib. 284, 293; *Kemp v. Darnley*, Duer, 1; *Fisher v. Murray*, 1 E. D. Smith, 341.

Elwell & Marvin, for Drake. The only objection that can be raised to said assignment is that it is a fraud on the rights of the partners, inasmuch as it destroys the partnership. If this is a wrong, it certainly

does not injure the creditors, and neither of the partners make any complaint. The partner who was not consulted is the only person who has a right to complain. No one else can, for he alone was injured.

The court will sustain an assignment made by one partner for the benefit of all the creditors. Burrill on Assignments, 42-44, 51.

No one but an absent partner can question the validity of an assignment executed by his copartner. It is not void "*per se*," but only voidable at the election of the absent partner. 4 Washington C. C. 232; *Sheldon v. Smith*, 28 Barb. 593; 4 N. Y. Digest, 191, 311. As to a subsequent ratification, see 5 Hill, 107; Story on Assign. secs. 239-244.

Admitting that one partner cannot, in law, make such an assignment, yet he might, in view of the fact that the firm was insolvent, file his bill in equity, asking that the firm property might be sold for the benefit of all the creditors. And if he has done what a court of equity would have done, then the court will sustain the act.

Prentiss, Baldwin & Ford, for defendants in error: I. This case, so far as the power of one partner, McKay, is concerned, to make a general assignment of all the personal property of a firm consisting of two partners, does not raise the abstract question of such a power in Ohio, under our law forbidding preferences, and making a ratable and equal distribution; but if it did, there is very much to be said in favor of such a power. But this case stands upon the following circumstances, differing it from the mere abstract question:—

1. The firm was insolvent.

2. An attachment had been got out, of course, for fraud, and that of Tracy, the partner who, it is claimed, did not join in the assignment.

3. Tracy was applied to to join, and assented, but then expressed a wish to see his counsel about it, and after doing so declined, and subsequently deliberately assented again. He never objected to it, and his subsequent express ratification of it made it good from the beginning.

II. Was it a lien or incumbrance plaintiffs in error had after the sheriff gave up the property? The attachment was gone; if plaintiffs had anything, it was an equity, so that a court of chancery could have enforced their remedy, and that court only; and the probate court could not,—the expression lien or incumbrance referring to some plain legal right.

It seems plaintiffs are willing to recognize the assignee, as such, under this assignment, and place the attached property in his hands, giving up the attachment; but they say they have an agreement from him that he will not do his duty, and administer the assignment as the law requires him to do, but do so for their exclusive benefit. No court of equity would admit this as a good title for relief. Again, when the motion to dissolve the second attachment was declared for plaintiffs, they had no subsisting attachment, for it was already dissolved by their own act of giving up the property, and the refusal of the court to dissolve it, on the ground that Tracy was guilty of no fraud, would not give vitality to it. And now plaintiffs call on the probate court to require the assignee to violate his duty as such,—go on and sell the attached property after the sheriff has surrendered it, and account to them for the whole of it, because he has promised to do so. Why did not they have the sheriff hold on to it

if they had a good title? Why did they seek to entrap the assignee into an agreement contrary to his duty, and use him as their mere instrument? The contract and promise were void against public policy, and against the spirit of the statute, and against the rights of the rest of the creditors. And there was no lien or incumbrance, and no remedy, unless to go into a court of equity and move there. *Hyde v. Olds*, 12 Ohio, 591; Story on Part. 322, 327, 328; *Hitchcock v. St. John*, 1 Hoffm. 511; 1 Hardy, 87; Burrill on Assign. 51, 306, 340; *Sheldon v. Smith*, 28 Barb. 593; *Robinson v. Gregory*, 29 Barb. 560.

WELCH, C. J. The important question in the case is, whether one member of an insolvent firm, either before or after dissolution of the partnership, can make a valid assignment of all its effects for the benefit of creditors against the will of a copartner, or without procuring his assent when present or accessible. Until this question is decided in the negative, it is unnecessary to consider the questions whether this firm was dissolved by the published notice, and if so, whether such dissolution had the effect to lessen or take away the power to assign. The important question is, did the power ever exist?

The authorities and decisions on this subject are quite numerous, and are far from being uniform. It is deemed unnecessary here to attempt a review of them, or to enter into or repeat the reasoning *pro* and *con* on which they assume to stand. The leading cases will be found enumerated and referred to in Parsons on Partnership, 165 (notes *l*, *m*, *n*, *o*), and Story on Partnership, sec. 101, note 2. We have examined these cases with much care and consideration, and think the weight of authority, as well as the better reasoning, is with those who deny the validity of such an assignment. The power to make it is not within the contemplation of an ordinary partnership contract. It is not a power to act as *agent* of the company in carrying on its business and paying its debts, but a power to *appoint* an agent and to clothe him with all the powers of the partners. If the power exists where there are only two partners, as in the present case, it must also be conceded where there are many. It is easy to see that in many such cases it might be exercised to the great injury and annoyance of the non-consenting members of the firm. It is often the case, especially in times of financial depression, that a firm, if forced into liquidation, and their effects sold under the hammer, would prove insolvent, whereas if suffered to struggle on they would become solvent and successful. In such cases a single member, without the concurrence of the creditors, could, by the exercise of the power in question, bring it to an end, and place all its interests in the hands of a trustee of his own selecting; or, by threatening to exercise the power, he could compel his copartners to submit to unjust terms of forbearance. True, he might, in the absence of such a power, where the terms of the partnership did not forbid it, by a proceeding in equity dissolve the firm and place its assets in the hands of a receiver. But in that case the receiver would be chosen and appointed by the court, and not by the partner, and the other members of the firm would be consulted and heard. We think the safer and juster rule is to require the assent of all the partners, either actually given or to be fairly implied from the situation of the parties, or from the manner of conducting the business of the firm.

But it is claimed that the assignment took effect from the date of its execution by McKay, because its subsequent approval by Tracy related back and took effect from the date of its execution, which was prior to the attachment. As between the partners, and as between them and third persons who acquired no new rights in the mean time, this is undoubtedly true. Such is the well settled law in all cases of volunteer agencies. It is equally well settled, however, that it cannot have effect so as to defeat the rights of third persons *bond fide* acquired in the mean time. A contrary rule of law would be calculated to work manifest injustice. Take the present case for an example. Holland and Pettitt levied their attachment while the assignment remained in abeyance. It might never be confirmed by Tracy. With him alone rested the power to give it effect or to defeat it. If Holland and Pettitt dismissed their attachment, Tracy might fail to affirm the assignment, and they would lose their lien if they persisted in their attachment proceedings. Tracy might affirm the assignment, and they would be left to pay their costs. They would thus be placed completely within Tracy's power, and their rights be made to depend on his will or caprice. Such is not the law. The assignment took effect from the date of its execution, but not so as to affect the rights acquired by the intervening attachment. The question, therefore, whether the assignment is to be regarded as taking effect from the time when it was delivered to the probate court, or from the time of its actual acceptance by the assignee, becomes immaterial. It is enough that the attachment was levied before the confirmation by Tracy.

It is also claimed that the lien of the attachment was lost by the agreement under which the property was delivered to the assignee by the sheriff. We are of opinion that the parties are estopped by their agreement from setting up any such defence. The property was given into the hands of the assignee on the faith of the agreement. But for the agreement it would have been retained and sold by the sheriff. To allow this defence would be to aid the defendants in practising a fraud upon the plaintiffs.

A further claim made by the defendants in error is that the proper parties were not before the court; that the creditors of the firm, as well as the assignee, should have been made parties defendant. We think otherwise. The assignee, like an executor or administrator, is an officer recognized by the law, and whose duties and qualifications are regulated by law, and he fully represents the creditors in such cases.

The judgment of the common pleas and probate courts must be reversed, and the cause remanded to the probate court for further proceedings.

COURT OF APPEALS OF MARYLAND.

(To appear in 45 Md.)

ERROR IN SENTENCE.—POWER OF APPELLATE COURT.—TWICE IN JEOPARDY.

McDONALD v. THE STATE.

Where a sentence not authorized by law has been imposed upon a prisoner, the court of appeals can only reverse the judgment; it has no power to impose the proper sentence, or to remand the case to the court of original jurisdiction for that purpose.

Where the accused was illegally sentenced and judgment reversed on this ground by the appellate court; *held*, that the accused could not be again tried for the same offence.¹

APPEAL from the criminal court for Baltimore city.

The case is stated in the opinion of the court.

The cause was argued before Bowie, Stewart, Miller, and Alvey, JJ., on the part of the appellant, and submitted on brief on the part of the state.

John P. Poe, for the appellant.

The Attorney General, *Gwinn*, *contra*.

MILLER, J., delivered the opinion of the court. The plaintiff in error was indicted for murder, and on his trial was found guilty of manslaughter and not guilty of murder. Upon this verdict the criminal court of Baltimore city, in which he was tried, pronounced judgment, sentencing him to "*five years*" imprisonment in the jail of Baltimore city," and this judgment is brought before us for review by writ of error.

The punishment prescribed by law (Act of 1864, ch. 89) for the crime of manslaughter is confinement in the penitentiary for not more than ten years, or in the discretion of the court a fine of not more than five hundred dollars, or imprisonment in jail for *not more than two years*, or both fine and imprisonment in jail. The attorney general admits that through inadvertence a sentence was imposed on the prisoner which the law does not authorize, and concedes upon the authority of *Watkins v. The State*, 14 Md. 412, this judgment must be reversed. That is undoubtedly so, and the only other question we can now decide is, whether upon such reversal this court has the power to impose the proper sentence or to remand the case to the court of original jurisdiction for that purpose. In the absence of legislation conferring that authority upon this court, it is clear it has no power to do either of these things. In *Watkins v. The State*, where the judgment was reversed for a similar defect, the court say: "The effect of the reversal for error in the judgment itself is properly stated by the counsel for the plaintiff in error in his argument. It defeats all former proceedings in the cause. This will abundantly appear by reference to the following authorities cited by him on this point: 1 Chitty's Cr. Law, 755; 4 Blackstone's Com. 393; Hawkins, book 2, ch. 50, sec. 19." In addition to these authorities we refer to several more recent de-

¹ The decision announced in the second paragraph of the syllabus was made by the trial court. EDITOR.

cisions of the English and Irish courts upon the subject, viz.: *Rex v. Ellis*, 5 Barn. & Cress. 395; *King v. Bourne*, 7 Adol. & Ellis, 58; *Silversides v. The Queen*, 2 Gale & Davison, 617, and *Holland v. The Queen*, 2 Jebb & Symes, 357. In each of these, and especially in the first two, it was, upon full review of all previous decisions, denied that a court of error had any power in a case like this, either to remand the record to the court below for the proper judgment, or itself to pronounce such judgment as the law authorized; and *Rex v. Kenworthy*, 1 Barn. & Cress. 711, which was cited in support of the power to remand, is there shown to be a case in which *no judgment* had in fact been given, and it was therefore remitted back to the sessions in order that a judgment might be rendered. In this country, also, the decisions, wherever the question has arisen, are almost uniform and to the same effect. It was so decided in several cases by the supreme court of Massachusetts, and we need refer only to *Christian v. The Commonwealth*, 5 Met. 530. After these decisions the legislature of that state provided by statute, that "whenever a final judgment in any criminal case shall be reversed by the supreme judicial court, upon a writ of error, on account of error in the sentence, the court may render such judgment therein as should have been rendered, or may remand the case for that purpose to the court before whom the conviction was had," and the supreme court of that state has since acted under that statute. *Jacquins v. The Commonwealth*, 9 Cush. 279.

In New York there is a series of cases in the inferior courts to the like effect, and in *Ratzky v. The People*, 29 New York, 124, the court of appeals of that state held it to be well settled law, that but for the authority conferred upon that court by the statute of 1863, it would have no power, upon reversal of the judgment of the supreme court in that case for error in the judgment itself, either to pronounce the appropriate judgment, or remit the record to the oyer and terminer, to give such judgment. The statute referred to declared in effect, that the appellate court shall have power upon any writ of error, when it shall appear that the conviction has been legal and regular, to remit the record to the court in which such conviction was had, to pass such sentence thereon as the appellate court shall direct. There are also numerous cases in other states where the same question has been incidentally decided in the same way.

In *Ex parte Lange*, 18 Wallace, 163, the judges of the supreme court of the United States, though differing upon other points, agree in the proposition, that apart from authority conferred by the legislature, appellate tribunals have only the power of reversal where in criminal cases the judgments are entire and not such as the law authorizes to be imposed, and all the cases on the subject are collected and referred to in the dissenting opinion of Mr. Justice Clifford in that case.

We have been able to find but two cases which are in even seeming conflict with the great weight and current of judicial precedent and authority on this question.

One of these is the case of *Kelly v. The State*, 3 Sm. & Mar. 518, decided by the high court of errors and appeals in Mississippi, in 1844. There the judgment was reversed for two reasons: 1st, because it did not appear in the record that the prisoners were personally in court at the time of pronouncing the sentence; and 2d, because the sentence did not

set forth the time from which the imprisonment was to date. For these two errors, say the court, "the judgment of the court below is reversed without disturbing the verdict, and the cause remanded with directions to the court below to pronounce its judgment in accordance herewith, having first duly inquired of the defendants whether they have anything further to urge why its judgment should not then be pronounced." No question was made in argument, and no authority is referred to by the court, in support of the power to remand thus exercised, and this has led us to examine the statutes of that state as to the powers conferred on its appellate court at that time. As expected, we find (Hutchinson's Code, 927) that that court was clothed with very full authority in such cases. They had power, upon the reversal of any judgment or sentence, to render such judgment or pass such sentence as the court below should have rendered or passed; and the power to remand in criminal as well as in civil cases, where there is anything uncertain in the judgment or sentence, is also given in very broad and general terms. We think, therefore the court in this case rested their action not upon the supposed possession of any inherent or common law powers to that end, but upon statutory authority well understood and recognized in that state.

The other case is that of *Beale v. The Commonwealth*, 1 Casey, 11, decided by the supreme court of Pennsylvania, in which the opinion was delivered by C. J. Lewis, from which Woodward, J., dissented. To understand what weight as authority justly attaches to this case, we must first look to the antecedent decisions and legislation on this subject in that state. It appears that in the course of the argument in *Drew v. The Commonwealth*, 1 Whart. 279, which took place in 1835, Rogers, J., referred to a recent case in which he said the supreme court had decided that where the indictment was good, and the trial good, that court would do what the court below would do after a new conviction, viz., sentence the party *de novo* and aright. In the following year, 1836, the legislature gave express power to the court, "to examine and correct any and all manner of errors of the justices, magistrates, and courts of the commonwealth, in the process, proceedings, judgments and decrees, as well in criminal as in civil pleas or proceedings, and thereupon to reverse, modify, or affirm such judgments and decrees or proceedings as the law shall direct." After this came the case of *Daniels v. The Commonwealth*, 7 Barr, 371, in which the opinion was delivered by Rogers, J. In that case this statute is set out, and the court say that by it, "in addition to the power to reverse or affirm heretofore given, we have authority to modify the judgment; that is, to change its form, vary or qualify it, and this as well in criminal as in civil cases. It would certainly be better if the court had power also to remit the record, but as this is not given by the Act of 1836, we must examine the sentence and do right and justice according to circumstances;" and accordingly, acting under the statute, the court struck out the words "hard labor" from the sentence and affirmed it in other respects. It appears to us the court in that case clearly decided they had no power to remand the record, and that their only power to modify the sentence was derived from the statute. Then comes the case referred to of *Beale v. The Commonwealth*, in which C. J. Lewis says: "The doubts which formerly existed respecting the power of the

supreme court upon reversing a judgment in a criminal case are entirely dissipated. We have authorities to show that the supreme court, on reversal of a judgment in a criminal case for error in the sentence, has power to pass such sentence as the court below ought to have passed." For this position *Drew v. The Commonwealth*, and *Daniels v. The Commonwealth*, are first cited. What these cases, and especially the latter, decide, respecting this power and whence it was derived has been stated. Two other cases, *Commonwealth v. Ellis*, 11 Mass. 465, and *Kane v. The People*, 8 Wend. 211, are also added in the same citation. These we have examined, but are unable to perceive that they have any bearing upon the proposition stated. We have fully shown what the Massachusetts and New York decisions on the question under consideration actually are, and as respects them there can, we think, be no doubt. He then says, "it has also the power to award a *procedendo* in a criminal case." For this *Rex v. Kenworthy*, 1 B. & C. 711, is cited, and that case, the subsequent English decisions have declared, was one in which no judgment was rendered in the court of original jurisdiction. That case is therefore no authority for the position that a *procedendo* can be ordered after a reversal of a judgment in a criminal case for error in the sentence itself. He then adds "and it may, in its discretion, remit the record with orders to proceed on the indictment after the reversal of an erroneous judgment." For this *Commonwealth v. M. Kisson*, 8 Serg. & R. 422, and *Commonwealth v. Church*, 1 Barr, 110, are cited. These were cases brought up by the state from judgments quashing the indictments, and the court reversed the quashing orders, sustained the indictments, and remanded the cases, to the end that the parties might be tried under them. There the parties had never been tried, and no judgments had ever been pronounced against them. If nothing more was meant to be asserted by the proposition than was decided in these cases we have no occasion to quarrel with it. A large number of cases in this and other states might be cited to the same effect. But he then says, "The Act of 16th of June, 1836, conferred no new powers in this respect. It was designed to remove doubts which had arisen in consequence of conflicting decisions." If, however, the court in *Daniels v. The Commonwealth* did not decide that this act conferred a new power upon the court as to their control over judgments in criminal cases, they were certainly unfortunate in the language they there use, or we are unfortunate in being unable to comprehend it. Nor have we been able to find in the published reports any anterior conflicting decisions from which doubts as to the power of the court in such cases could have arisen. We may have overlooked them, or the reference may be to some unreported and unpublished decisions of that character. But certain it is that neither in the title, preamble, nor other parts of this act is there any reference to such doubts or conflicting decisions. Such reference or recital is frequently, if not usually, made in statutes passed for such purposes. The learned chief justice, for whose abilities and well earned reputation we have great respect, then proceeds thus: "The common law embodies in itself sufficient reason and common sense to reject the monstrous doctrine, that a prisoner whose guilt is established by a regular verdict is to escape punishment altogether because the court committed an error in passing the sentence. If this court sanctioned such a

rule, it would fail to perform the chief duty for which it was established. Our duty is to correct errors, and to minister justice. But such a course would perpetuate error and produce the most intolerable injustice." But to these propositions we cannot yield assent. No such doctrines have ever been announced by the tribunals that for centuries have made, interpreted, and administered the common law. On the contrary, the courts of England in administering justice in criminal cases have, save in rare and exceptional instances, been watchful of the liberties of the subjects, and have taken care they should not be oppressed by the crown. Their doctrine has been that men must be punished according to the law of the land, and that to punish them otherwise is tyranny. It would, we think, be a startling novelty to the great judges of the English courts to be told it is monstrous and intolerable that a party should escape punishment who has been duly convicted of crime, but upon whom a sentence has been imposed which the law does not authorize. From the many cases wherein they have made decisions that have led to that result, we infer they have regarded such escapes as less fraught with evil consequences, than for courts to attempt to *usurp authority* in order to inflict punishments. The decision which we have thus examined at length is, in our judgment, exceptional, and in conflict with the whole current of authorities, both in England and in this country. We cannot adopt or follow it, and shall not exercise any such powers, unless they are conferred upon this court by the legislature.

Is there then any law which has given this court the power to pass a proper sentence in this case, or to remand it to the criminal court for that purpose? We know of none. The 14th and 16th sections of art. 5 of the Code have no application to such cases. They give the court no power to modify criminal sentences, or to direct them to be modified by the inferior courts. The same provisions were in force when *Watkins v. The State* was decided, and in that case this question was fully argued. The reversal of that judgment without a *procedendo* is conclusive of it.

Whether the plaintiff in error, by thus requesting and obtaining his discharge from this indictment, has waived the protection which the law provides against the second jeopardy, so that he can be re-indicted and retried on the same charge, as has been suggested by some jurists and text writers, is a question we are not now at liberty to decide. It has not been argued on either side by counsel, and we should be stepping far beyond the line of duty, if not committing a grave impropriety, in now expressing any opinion upon it. We can only say with C. J. Shaw, in *Christian v. The Commonwealth*, that "whatever other remedy the state may have, it is not competent for this court to pass a new sentence upon this prisoner, nor to remit the case to the criminal court." Our power is limited to a simple reversal of the judgment. *Judgment reversed.*

NOTE BY THE REPORTER. — After the above decision was rendered, the prisoner, Patrick McDonald, was arrested, while in the jail, upon a bench-warrant issued out of the criminal court of Baltimore city, charging him with the murder of Daniel Brown. Whereupon he petitioned the Hon. Jas. L. Bartol, C. J., for a writ of *Habeas Corpus*, which was granted; and upon the hearing, it was admitted on the part of the state

that the felony and murder charged in the warrant was the same as that for which the petitioner had before been indicted and tried; the chief judge, after full argument, discharged the petitioner, deciding:—

1st. That the facts being admitted, it was competent for the judge under the Code, art. 48, to decide the question whether there was sufficient legal cause for the detention of the petitioner.

2d. That the petitioner having been arraigned and regularly tried upon a sufficient indictment, and a legal verdict having been rendered, had been in jeopardy, and that he could not lawfully be placed in jeopardy a second time for the same offence.

3d. That the former trial was, in no sense, a mistrial. If it had been, the court of appeals would have remanded the case, so that the party might be tried again.

4th. That the petitioner, by suing out his writ of error, and obtaining a reversal of the judgment, had not waived the protection which the law provides against a second jeopardy, and was not liable to be again indicted and tried for the same offence.

In the opinion rendered by the chief judge, he remarked: "If the prisoner, after having been duly convicted of manslaughter, escapes punishment, by reason of an error in the sentence, this results from the want of legislative provision in such cases to enable the court of last resort to correct the sentence, or to remand the case to the criminal court for that purpose. Such legislation was had in England in 1848 (11th and 12th Victoria, ch. 78), and has been enacted in several of the states."

EVIDENCE. — LOST LETTER. — PERSONAL RESEMBLANCE. — DEPOSITION OF DECEASED WITNESS. — ENTRIES IN FAMILY BIBLE. — MARRIAGE. — PRESUMPTIONS. — ILLICIT COHABITATION. — MARRIAGE OF SLAVES.

JONES v. JONES.

Where a person to whom a letter was addressed has been dead for several years, leaving no personal representative of whom inquiry could be made concerning it, and the letter is not shown to have been of such importance as to require its preservation, it may well be presumed that the letter has been lost or destroyed, and secondary evidence of the address written on it may be admitted.

In a trial involving the question, whether a particular person was the legitimate child of his alleged parents, evidence of his personal resemblance to his alleged father is not admissible.

To render admissible the deposition of a deceased witness taken in an equity cause, it is incumbent upon the party offering the deposition to prove the bill and answer in the cause.

The offer of the deposition should be accompanied with a proffer to show that it was the deposition of a deceased witness taken under oath, in a judicial proceeding, involving substantially the same question or matter in dispute as that on trial, to which the plaintiff and defendant in the suit on trial were parties, and that the party against whom it is sought to be used had the right and opportunity to cross-examine the witness.

It is improper to offer *all* the original papers in the former cause without disclosing of what the papers consisted.

Not all the proceedings in an equity cause can be offered in order to let in the deposition of a deceased witness, but only such parts of the proof as show the nature of the cause, and the parties to the controversy; and they are not to be received as evidence for the jury, but for the court only, to enable it to determine whether the deposition is evidence proper to be allowed to go to the jury.

In order to prove the existence of a record which does not belong to the same court, the proof must be by transcript under seal, and not by the original papers.

The entire case, or the consideration of any particular question involved in it, should not be taken from the jury upon a prayer that there is no sufficient evidence to justify the finding for the adverse party, if there be any evidence from which a rational conclusion may be drawn as opposed to the theory of such prayer.

Before such a prayer can be granted, the court must assume the truth of all the evidence before the jury tending to sustain the claim or defence, as the case may be, and of all inferences of fact fairly deducible from it, as on demurrer to evidence; and this though such evidence be contradicted in every particular by the opposing evidence in the cause.

But where the evidence is of such an inconclusive nature that no rational conclusion can be fairly drawn from it in support of the claim or defence sought to be maintained by it, it is the imperative duty of the court to instruct the jury that such evidence is not sufficient to be considered by them.

Questions as to whether verdicts have been rendered against the decided weight of evidence, or in disregard of the rules of evidence, or from passion or prejudice, can only be dealt with by the court in which the trial takes place, upon motion for a new trial.

In a case involving the question of marriage, where there is no impediment to marriage, and the connection between the parties was illicit in its commencement, it will be presumed to continue to be of the same character; and in order to overcome that presumption it will be necessary to adduce other evidence than that of the cohabitation of the parties to establish their marriage.

If, after the birth of a person claiming to be the legitimate child of his parents, though born as a bastard, there be no cohabitation of his father and mother, the latter assuming the name of the former, and the parties treat each other as man and wife, and treat the claimant as their child, and they are treated as, and reputed to be, man and wife by their friends and acquaintances, these are facts proper to be submitted to the jury, from which marriage may be inferred, notwithstanding the original illicit connection between the parties.

The presumption of marriage will not arise from the cohabitation of a man with a woman, if during her life and without any proof of a divorce, he marries another woman.

Under the law of this state the marriage of a slave without the consent of the master was not actually void.

The Act of 1777, ch. 12, prohibited ministers of the gospel from publishing the banns, or celebrating matrimony between servants, or a servant and a free person, without the consent of the master. *Held*: that this act did not render the prohibited marriage void.

On questions of marriage, births, deaths, &c., entries in a family Bible or Testament are admissible, even without proof that they have been made by a relative, provided the book is produced from the proper custody. Proof of the handwriting or authorship of the entries is not required, when the book is shown to have been the family Bible or Testament.

APPEAL from the superior court of Baltimore city.

This case arises from the following issues sent from the orphans' court of Baltimore city to the superior court for trial:—

First, Is Henry Jones, one of the respondents to the petition in this cause, a lawful child of Andrew D. Jones, the intestate, whose estate is for distribution in the cause?

Second, Did the said intestate leave a widow? If yea, who?

By the order sending these issues for trial, Henry Jones was to be the plaintiff in said trial, and David Jones and others the defendants. All the

parties are colored persons. Henry Jones, the plaintiff, claims to be the legitimate child of Andrew D. Jones, deceased, and that his father was married to his mother, Henny Jones, a slave woman, after the year 1819, and offered evidence at the trial tending to prove this fact. The defendants claim, and offer evidence tending to show, that Andrew D. Jones, at the time of the alleged marriage, was the lawful husband of Anne Jones, who died about the year 1844, after which he married Francis Moore, who claims to be his widow.

The *first*, *second*, and *third* exceptions are sufficiently stated in the opinion of the court.

Fourth Exception. The defendants, after other evidence, produced a paper purporting to contain the deposition given by one Tabitha Toy, before W. S. Pinkney, a commissioner of the circuit court of Baltimore city, in a cause depending in said court of *Jones v. Jones*. And further offered to prove that said paper had been filed among the proceedings in said cause, and that it was now produced from the bundle of original papers in said cause, all of which original papers defendants offered to give in evidence, and offered to prove that they were the original papers, and all of the original papers in said cause, and that said plaintiff was a party to said cause. And also offered to prove by the commissioner who took said deposition, that it was taken before him as commissioner of the circuit court of Baltimore city, in said equity case of *Jones v. Jones*, and returned by him to said court. And also offered to prove that said Tabitha Toy was now dead. And thereupon offered said paper, purporting to contain the deposition of said Tabitha Toy in evidence, in connection with the offer to prove the facts above stated. The plaintiff objected to the reading of said deposition in evidence under the offer made by the defendants, and the court (Dobbin, J.) sustained the objection. The defendants excepted.

Fifth Exception. After all the evidence was closed, the defendants offered the following prayers:—

1. If the jury find from the evidence that Henry Atkins, *alias* Jones, was the child of Henrietta Atkins, and that said Henrietta was, at the time of the birth of said Henry, a single woman, and that after the birth of said Henry no marriage in fact was had between said Andrew and Henrietta, then the verdict on the first issue should be for the defendants, and that there is no evidence of any such subsequent marriage.

2. If the jury find that Andrew D. Jones married Anne Smith in February, 1819, and thereafter lived and cohabited with her as his wife until the death of said Anne, if they shall find such death, and that after the death of said Anne, the said Andrew married the said Frances, and lived and cohabited with her as his wife until his death; then the marriage of said Andrew and Henrietta, as alleged, cannot, after the marriage of said Andrew and Anne, be established by cohabitation between said Andrew and Henrietta, or by repute that they were married, unless the jury find such cohabitation or repute between the death of said Anne and the marriage of said Andrew and said Frances; and if the jury do not find such cohabitation and repute of said Andrew and Henrietta in the said interval, then the plaintiff ought to prove an actual marriage between said Andrew and Henrietta before the marriage of said Andrew and Anne, if the jury find the latter marriage.

3. That the burden of proof is upon the plaintiff, Henry Jones, to establish his legitimacy by showing a valid marriage between Andrew D. Jones and Henrietta Atkins, either by a marriage actually celebrated, or in the absence of proof of such a marriage, by the cohabitation of said Andrew and Henrietta as man and wife, or by repute that they were married, and that there is no evidence in this cause of any such marriage actually celebrated, nor of the cohabitation of said Andrew and Henrietta as man and wife, nor of any repute that they were married, or were husband and wife.

4. That if the jury shall find any intercourse whatever between the said Andrew and said Henry Atkins, and that the same was illicit in its commencement, then the presumption of law is that it so continued, and the burden of proof is upon the plaintiff to establish some subsequent valid marriage, of which there is no evidence.

5. That if the jury find that Andrew D. Jones married Anne Smith, on the 14th February, 1819, and that they thereafter lived together as man and wife until the death of said Anne, if they shall find such death, and that thereafter the said Andrew married Frances Jones, and lived with her as his wife until the death of said Andrew, and shall find that the said Henry Jones, the plaintiff, was not born earlier than the year 1820, and that the said Henrietta Atkins, his alleged mother, never cohabited with said Andrew, nor bore his name commonly, nor was by repute known as the wife of said Andrew, then the plaintiff cannot recover, and the finding of the jury upon the first issue should be for the defendant.

6. That there is evidence in the cause from which the jury may find that Frances Jones was lawfully married to Andrew D. Jones, and that if they so find, their finding on the second issue should be, that Andrew D. Jones did leave a widow, and that that widow is Frances Jones, one of the defendants.

7. That if the jury find that at the time of the alleged marriage between said Andrew and Henrietta, the said Henrietta was a slave, and thereafter continued a slave until the year 1863 or 1864, then the said alleged marriage was not valid, unless the owner of said Henrietta consented thereto; and if the jury shall find that Captain Frazier, mentioned in the evidence, was, during the time aforesaid, the owner of said Henrietta and never consented to the said marriage, then the jury should find that no valid marriage took place between said Henrietta and Andrew, as alleged on the part of the plaintiff, and that there is no evidence in the cause from which the jury can find or presume that said Captain Frazier, in his lifetime, or during the time aforesaid, consented to said alleged marriage, or treated said Henrietta as having been married, and that there is no evidence of any marriage between said Andrew and said Henrietta after the latter became a free woman.

8. That if the jury believe that the slip cut and produced in evidence was taken from a Bible, a part of a Bible found in the intestate's house, and in the custody of his administratrix, then the same is evidence of itself without the necessity of proof of handwriting.

The plaintiff's counsel agreed in open court that the court should instruct the jury as prayed in the defendants' fifth prayer, and the court accordingly granted the same, and also granted the defendants' sixth

prayer, but rejected their first, second, third, fourth, seventh, and eighth prayers. The defendants excepted.

The jury found by their verdict "that Henry Jones, the plaintiff, is a lawful child of the said Andrew D. Jones, the intestate. And that Frances Jones, formerly Frances Moore, is the surviving widow of the late Andrew D. Jones." The defendants appealed.

The cause was argued before Bartol, C. J., Stewart, Bowie, and Alvey, JJ.

Julian I. Alexander & George H. Williams, for the appellants.

H. C. Wysham & Bernard Carter, contra.

ALVEY, J., delivered the opinion of the court.

The issues for trial in the court below were: 1st, Is Henry Jones a lawful child of Andrew D. Jones, deceased; and, 2dly, Did the said Andrew D. Jones have a widow, and if yea, who? These issues were sent from the orphans' court to be tried, and upon trial the jury found that Henry Jones is a lawful child of Andrew D. Jones, deceased, and that the latter left a widow, Frances Jones, formerly Frances Moore.

In the course of the trial several exceptions were taken by the appellants; four to rulings on questions as to the admissibility of evidence, and the fifth to the refusal of certain prayers offered by the appellants.

The question raised by the first exception is as to the admissibility of secondary evidence of the superscription or direction of a letter written by the appellee, at Liverpool, to his mother, in Baltimore, in or about the year 1850; the question being to whom and how the letter was directed, the letter itself not being produced. The previous evidence had disclosed the condition of the mother, and the fact that she died about the year 1866. Her whole life, with the exception of the last two years of it, had been spent as a slave, and she died at the house of her former master. The letter is not shown to have been of any such importance as to require its preservation; and as the party to whom it was written has been dead several years, and there being no personal representative of whom inquiry could be made, it may well be presumed that the letter has been lost or destroyed; and therefore the evidence offered of the address written on the letter was properly received. 1 Taylor on Ev. sec. 899.

By the second and third exceptions, the question was presented as to the admissibility, as evidence to the jury, of the personal resemblance of the appellee to his alleged father, Andrew D. Jones, deceased; and the court below allowed the evidence to be given.

In the argument here no authorities on this question were cited by counsel for either party; but upon examination we find that such evidence has been admitted in the trial of questions of *partus suppositio*, but in those cases only.

In the celebrated Douglas cause, decided by the House of Lords in 1769, Lord Mansfield said that he had always considered likeness as an argument of a child's being the son of a parent. In other cases, if there should be a likeness of features, there might be a discriminable voice, a difference in the gesture, the smile, and various other things; whereas, a family likeness ran generally through all these; for in everything there was a resemblance, as in features, size, attitude, and action. He accordingly allowed weight to the proved resemblance of the appellant in that

case and his brother to Sir John Stewart and Lady Jane Douglas, and to their dissimilitude to the other persons whose children they were alleged to be. And the same sort of evidence was admitted by Mr Justice Heath, in the case of *Day v. Day*, at the Huntingdon assizes, in 1797, upon the trial of an ejectment, where the question was one of *partis suppositio*. These cases are stated by Hubback in his work on the Evidence of Succession, page 384; but the author states them with strict limitation, and with apparent doubt whether such evidence be safe and reliable. And as we do not find the principle of these cases stated in other works on the law of evidence of approved authority, we think it fair to conclude that the cases mentioned have not been regarded as establishing a rule upon the subject. Indeed, Mr. Justice Heath, in the case of *Day v. Day*, just referred to, admitted that resemblance is frequently exceedingly fanciful, and he therefore cautioned the jury as to the manner of considering such evidence; and we all know that nothing is more notional in the great majority of cases. What is taken as a resemblance by one is not perceived by another, with equal knowledge of the parties between whom the resemblance is supposed to exist. Where the parties are before the jury, and the latter can make the comparison for themselves, whatever resemblance is discovered may be a circumstance, in connection with others, to be considered. But to allow third persons to testify as to their notions of the resemblance supposed to exist between parties, would be allowing that to be given as evidence upon which no rational conclusion could be based, but which might readily serve to mislead the jury. We think, therefore, the evidence should have been excluded, and that the second and third exceptions were well taken.

As to the ruling of the court below, as stated in the fourth bill of exception, we find no error. It was incumbent upon the parties offering the deposition to prove the bill and answer in the equity cause in which the deposition was taken, in order to show that a cause was depending, as well as to show who were the parties, and what was the subject matter in issue. Proof of bill and answer is not necessary where the deposition is used against the deponent as his own admission, or for the purpose of contradicting him as a witness; but the deposition was offered for no such purpose in this case. The offer of the deposition should have been accompanied with the proffer to show that it was the deposition of a deceased witness, taken under oath in a judicial proceeding, involving substantially the same question or matter in dispute as that on trial, to which the plaintiff and defendants were parties, and that the former had the right and opportunity to cross-examine the witness. 1 Taylor on Ev. secs. 434 to 438. These requisites were not all complied with in the offer made by the defendants. Though all the original papers were offered, *non constat* that they would have shown what was necessary to let in the deposition. Besides it was improper to offer *all* the *original* papers belonging to the equity cause, without disclosing of what the papers consisted. It is not all the proceedings in an equity cause that can be offered, in order to let in the deposition of a deceased witness. It is only such parts of the proceedings as show the nature of the cause and the parties to the controversy that are admitted, and they, not as evidence to the jury, but simply to the court, to enable it to determine whether the deposition is evidence

proper to be allowed to go to the jury. 2 Taylor on Ev. sec. 1413. Moreover, the original papers should not have been taken from the files of another court and produced, instead of copies or exemplifications, as provided for by the Code, art. 87, secs. 58 and 59. The principle has been long and well established, that, in order to prove the existence of a record which does not belong to the same court, the proof must be by transcript under seal, and not by the original papers; these can only be used in the court to which they belong. 2 Taylor on Ev. sec. 1380. This principle is fully recognized by this court in *Boteler v. State, use of Chew*, 8 Gill & John. 359.

We come now to the consideration of the prayers offered by the appellants, and which were refused by the court below.

The proposition involved in the first prayer is too clear for question, except the assertion which it contains that there is no evidence of the occurrence of any marriage between the parties named subsequent to the birth of the appellee.

Whatever we may think of the verdict as the result of the whole evidence in the cause, this court will not say that the entire case, or the consideration of any particular question involved in it, should be taken from the jury, upon a prayer that there is no sufficient evidence to justify the finding for the adverse party, if there be any evidence from which a rational conclusion may be drawn as opposed to the theory of such prayer. Before such a prayer can be granted, the court must assume the truth of all the evidence before the jury, tending to sustain the claim or defence as the case may be, and of all inferences of fact fairly deducible from it, as on demurrer to evidence; and this though such evidence be contradicted in every particular by the opposing evidence in the cause. Upon no other principle can the case be withdrawn from the consideration of the jury, who alone are competent to decide on facts of which contradictory evidence has been given. *McElderry v. Flannagan*, 1 H. & G. 308; *Leopard v. Ches. & Ohio Canal Co.* 1 Gill, 222. But on the other hand, where the evidence is of such light and inconclusive nature that no rational conclusion can be fairly drawn therefrom in support of the claim or defence sought to be maintained by it, it becomes the imperative duty of the court to instruct the jury that such evidence is not sufficient to be considered by them, and that their finding should be accordingly. Questions whether verdicts have been rendered against the decided weight of evidence, or in disregard of the rules of evidence, or from passion or prejudice, can only be dealt with by the court in which the trial takes place, upon motion for new trial. This court has no power to go into a critical analysis of the evidence to determine the comparative weight of that offered by the one side or the other; all that it can properly do, in regard to such question, is to determine whether there was any evidence *legally* sufficient to be submitted to the jury, and that determination is arrived at without at all considering the question as to the preponderance of the opposing evidence.

Now, in this case, the appellee fixes the time of his birth to be about the year 1820; and the most material part of the evidence offered by him, coming principally from himself as a witness, refers to a time subsequent to 1820. If, therefore, this evidence was legally sufficient to be submitted

to the jury, from which they might infer the fact of marriage of the appellee's mother with Andrew D. Jones, the court below was right in refusing the prayer. And, on careful consideration of the evidence, we think it was properly submitted to the jury. It is true, where there is no impediment to marriage, and the connection between the parties was illicit in its commencement, as it must have been in this case, according to the hypothesis of the prayer, it will be presumed to continue to be of the same character; and, in order to overcome that presumption, it will be necessary to adduce other evidence than that of the cohabitation of the parties to establish their marriage. *Barnum v. Barnum*, 42 Md. 251; Hubback on Ev. Suc. 860, 1 Bishop on Mar. & Div. sec. 506. But if evidence be adduced, such as shows a change in the conduct of the parties, or a change in the manner of treatment by their relations and friends, or other facts which indicate that they had changed their status before the world, and intended to make that relation lawful which was before unlawful, though such proof may not go to the direct proof of marriage, yet it may be sufficient upon which to found the presumption of marriage. And in this case, if, after the birth of the appellee, though born as a bastard, there was cohabitation of his father and mother, the latter assuming the name of the former, and the parties treated each other as man and wife, and treated the appellee as their child, and they were treated as and reputed to be man and wife by their friends and acquaintances, these are facts proper to be submitted to the jury, from which marriage may be inferred, notwithstanding the original illicit connection between the parties.

But while we think the first prayer was properly refused, we are of opinion that the second ought to have been granted.

As already mentioned, the jury have found that Andrew D. Jones left a widow surviving him, named Frances, formerly Frances Moore. The appellee's mother died, according to his own showing, in 1866, and there is not the slightest evidence to show, nor is it pretended, that the marriage of Andrew D. Jones to Frances Moore occurred after the death of Henny, the mother of the appellee.

How, or upon what theory, such a verdict was arrived at it is a little difficult to imagine. There was need of an explicit instruction from the court on this point of the case.

By the second prayer the court was asked to instruct the jury, that if it was found that Andrew D. Jones married Anne Smith in 1819, and thereafter lived and cohabited with her as his wife until her death, and that after her death said Andrew married Frances, and lived and cohabited with her as his wife until his death; then the alleged marriage of Andrew and Henny, the mother of the appellee, could not, after such marriage with Anne Smith, be established by *cohabitation* between Andrew and Henny, or by *repute* that they were married, unless such cohabitation or repute be found between the death of Anne and the marriage of Andrew and Frances; and if such cohabitation and repute be not found in such interval, then the appellant ought to prove an actual marriage between Andrew and Henny before the marriage of Andrew and Anne.

There is nothing in this prayer to which the appellee could rightfully object. It is, of course, very clear that Andrew D. Jones could not have been the lawful husband of two wives living at the same time. If, as a

fact, it be found that he married Anne Smith in 1819, and lived and cohabited with her, then, in the absence of direct proof of previous marriage, the presumption is that he was a single man when he married her, and during his marriage with her, of course, he could contract no valid marriage with another woman. The reason for such presumption is very clearly stated in the case of *Breakey v. Breakey*, 2 N. C. Q. B. 349, 358, where the chief justice of that court, in delivering his opinion, said: "If Andrew Breakey, after cohabiting many years with this defendant, had, during his lifetime, married another woman in this country, he would, by that act, have destroyed the presumption of his marriage with the defendant, which would otherwise have arisen from the fact of cohabitation. He would have shown by it, what the law could not have presumed, that he was willing to incur the moral guilt of living with a woman as her husband when he was not her husband, for inevitably this must have been the case in regard to one or the other of the women, when both were, to his knowledge, living at the same time. The consequence then would have been, that, if charged with bigamy in contracting the second marriage, the presumptions would rather have been against the fact of the first marriage, for cohabitation would in such case have supplied none in its favor; and the inference would rather be, that he must have been aware there was no sufficient ground for the reputation of the first marriage, or he would not have incurred the guilt of felony, and the danger which attends it, by marrying again." The principle thus stated appears to have been followed in subsequent cases in the same court. 1 Bishop on Mar. & Div. sec. 444. Here, there is no pretence that there is any direct proof of marriage between Andrew D. Jones and Henny, the mother of the appellee; the only evidence relied on being that of habit and repute. The presumption of marriage from cohabitation may be rebutted by evidence of separation, without apparent rupture or sufficient cause. *Jackson v. Claw*, 18 John. 346; *Senser v. Bower*, 1 Penn. St. 450. And in case of conflicting presumptions, the one in favor of innocence shall prevail. 1 Penn. St. 452. This is fully exemplified by several cases stated by Bishop, in his work on Marriage and Divorce, volume 1, section 446. As, for instance, where in a legitimacy case, an actual marriage between the parents was proved, it was held, that this fact of marriage could not be overthrown by showing, simply on the strength of cohabitation and reputation, a pre-existing marriage of one of the parties. And so, in a case occurring in the ecclesiastical court in England, where two women severally claimed administration of the effects of the deceased as being his widow, and the one who was last married to him offered to show that his marriage to the other woman was void by reason of his then having alive a former wife, who afterward, and before the last marriage, died; it was held, that evidence of cohabitation and repute was insufficient to establish the first marriage, notwithstanding both parties to it were dead, but such marriage should, as an actual fact, be proved. *Taylor v. Taylor*, 1 Lee, 571; 5 Eng. Ecc. Rep. 454.

If, then, it be found as a fact, according to the requirement of the appellants' second prayer, that Andrew D. Jones was married either to Anne Smith or Frances Moore during the life of Henny, the mother of the appellee (there being no evidence of any divorce), all mere presumption

of previous marriage with the latter, founded simply upon habit and repute, is at once overthrown, and it then becomes incumbent upon the appellee to establish the alleged marriage of his mother to Andrew D. Jones as an actual fact, by more direct proof.

The appellants' third prayer, we think, was properly refused, for reasons stated in considering the first prayer. There was some evidence legally sufficient to be submitted to the jury. And we think the fourth prayer was also properly refused. The form and terms of this latter prayer were calculated to mislead the jury; and besides, it asserted that there was no evidence of marriage.

The seventh prayer was also properly refused. It embodies the proposition that without the consent of the master the marriage of the slave was actually void. There is no warrant for this in the law of this state. The statute, Act of 1777, ch. 12, prohibited ministers of the gospel from publishing the banns or celebrating matrimony between servants or a servant and a free person, under penalty, without the consent of the master. But the statute did not declare the marriage void, nor was that the operation of it. The minister subjected himself to a fine, but the marriage was valid.

The eighth prayer of the appellants was rightly rejected. It did not require the jury to find what was essential to be found, namely, that the Bible from which the entries were taken was the family Bible of Andrew D. Jones, and had been in his possession as such. That the book was found in the intestate's house, after his death, in the possession of his administratrix, is no evidence that the deceased ever saw it. On questions of marriage, births, deaths, &c., entries in a family Bible or Testament are admissible even without proof that they have been made by a relative, provided the book is produced from the proper custody. Proof of the handwriting or authorship of the entries is not required, when the book is shown to have been the family Bible or Testament, for then the entries, as evidence, derive their weight, not more from the fact that they were made by any particular person, than that, being in that place as a family registry, they are to be taken as assented to by those in whose custody the book has been kept. 1 Taylor on Ev. sec. 585; *Hubbard v. Lees*, L. R. 1 Ex. 255.

For the reasons stated, we reverse the rulings of the court below in the second and third exceptions, and in refusing to grant the second prayer of the appellants, but affirm its rulings in all other respects; and remand the cause for a new trial.

Rulings reversed, and cause remanded.

SUPREME COURT COMMISSION OF OHIO.

(To appear in 28 Ohio St.)

TAXATION OF CORPORATION. — TELEGRAPH COMPANY. — REGULATION OF COMMERCE. — CONSTITUTIONAL LAW. — LEGISLATIVE POWER. — FOREIGN CORPORATION, ETC.

WESTERN UNION TELEGRAPH COMPANY v. MAYER, Treasurer.

1. Where a corporation is assessed on its gross receipts, under the provisions of "an act for the assessment and taxation of express and telegraph companies" (S. & S. 769-771), and pays such assessment to avoid the penalties and disabilities incurred by a refusal to pay, but under protest and after notifying the treasurer that an action would be brought to recover back; such payment is not voluntary, and an action may be maintained to recover back the amount so paid, if the tax is illegal.
2. A state tax on the gross receipts of such company for the year next preceding the assessment return is not a tax on commerce between the several states, within the meaning of article 1, section 8, of the Constitution of the United States, although they arose chiefly from messages pertaining to such commerce, or from messages originating or terminating outside of the state, or were earned on the lines of such companies outside of the state.
3. Corporations of other states are not *citizens*, entitled to all the privileges and immunities of citizens in the several states, within the meaning of article 4, section 2, of the Constitution of the United States, that provision being applicable to natural persons only.
4. Foreign corporations can exercise none of their franchises or powers within this state, except by comity or legislative consent. That consent may be upon such terms and conditions as the general assembly under its legislative power may impose.
5. The general grant of legislative power vested in the general assembly by article 2, section 1, of the Constitution, includes the power to collect revenue for public purposes, and the limitations on the exercise of this power are to be found in other provisions of that instrument, and in the Constitution of the United States.
6. The provisions of article 12 of the Constitution of Ohio are not grants of power to the legislature, but limitations and restrictions on the general powers conferred by article 2, section 1; and, among other things, section 2 of article 12 requires that all property subject to taxation shall be taxed by a uniform rule, and according to its true value in money.
7. The privilege that a foreign corporation enjoys by legislative consent of exercising its corporate powers, and of carrying on its business within the state, is not *property* within the meaning of article 12, section 2, of the state Constitution.
8. The provisions of "an act for the assessment and taxation of express and telegraph companies" (S. & S. 769-771), as amended, which requires a foreign telegraph company to pay a tax on its gross receipts for the year next preceding the return for assessment, at a rate equal to that on property, and prohibits any person from acting as agent, or transacting any business for such company that is in default of payment, are, in effect, a charge for the privilege of exercising its franchises and powers within the state, graduated according to the amount of receipts, not in conflict with any of the limitations on the power of taxation vested in the general assembly.

ERROR. Reserved in the district court of Hamilton County.

The case arises on a demurrer to the petition.

The action was brought under the act (2 S. & C. 1151) giving courts jurisdiction of actions to recover back taxes illegally assessed and paid, and to enjoin the collection of such taxes.

The petition sets forth: —

1. The plaintiff in error is a corporation organized under the laws of New York, having its principal office and place of business in the city and State of New York, doing business also in the State of Ohio, receiving and transmitting telegraph messages between points lying within the State of Ohio, and also between points in the State of Ohio and points in other states and countries.

2. Prior to 1869, plaintiff accepted, in writing, the provisions of the Act of Congress of July 4, 1866. 14 U. S. Stat. at L. 221.

3. That plaintiff's "wires, poles, batteries, office furniture, franchises, and other property" in Ohio has been and is taxed like other property in said state.

4. That plaintiff's lines cross nearly all states of the Union, and occupy portions of British America, and that a large amount of the commercial transactions, business, and intercourse of the people, &c., is carried on by means of their wires.

5. Section 16 of Ohio tax law of April 5, 1859, subjects all of plaintiff's said property to taxation, and all of said personal property has ever since been listed for taxation, and taxes have been duly levied and paid in accordance with the same. (Same in effect as paragraph 3, above.)

6. Acts of May 1, 1862, and Amendatory Act of April 13, 1865 (O. L.), for taxing railroads and telegraph companies (S. & S. 769-771), make *unfair and unlawful discrimination* between telegraph companies organized and doing business in Ohio and those organized under the laws of another state and doing business in Ohio, and same rate as upon other property, although plaintiff says about two thirds of said gross receipts are absorbed by the current expenses of its said business, while no person residing in Ohio, and no corporation having its principal office therein, is so taxed.

7. "That said double taxation is, and the act last above named creates, an unlawful tax upon commerce; is not uniform in its operations on all telegraph companies in Ohio; is unequal, oppressive, and unjust in its operations, and wholly illegal, and contrary to the Constitution of the United States and the State of Ohio."

8. That under said acts plaintiff made a true return to the auditor of said county of the gross receipts of its business in said county for the year ending May, 1870 — to wit, \$172,297 — of which \$153,850.99 was for business "which originated or terminated at a point or points outside of the State of Ohio;" "or, in other words, plaintiff says that said entire receipts were mostly for messages pertaining to commerce between the states, and other than messages sent from point to point within the State of Ohio, and a large portion of its said gross receipts in Ohio are earned on its own lines outside of said State of Ohio, and by its employees in other states of the Union than the State of Ohio."

9. That at the time of making said return to said auditor, "plaintiff duly protested, in writing, that the law levying said tax and requiring said return was unlawful and unconstitutional."

10. That said gross sum so returned to said auditor was placed upon the tax duplicate, and a tax levied thereon, amounting to the sum of \$5,757.93.

11. That section [7] of said Act of 1862 made plaintiff and its employees, agents, &c., liable to heavy penalties, disabilities, and punishments

if they should refuse or omit to pay such taxes for twenty days after the same should become due, and that plaintiff, on or about the 25th day of January, 1871, and after the same became due, to escape trouble, &c., and to save its agents and employees from prosecution, &c., paid to the said treasurer of Hamilton County the full amount of said taxes and penalty thereon, but that it paid said sum under protest, and with a distinct understanding with said treasurer that it would sue to recover back said amount, and then and there served said treasurer with *written* notice of its protest and determination to sue to recover said amount, as illegally assessed and required to be paid.

12. The United States government also levied and collected a tax on its said gross receipts for the year 1870.

13. Plaintiff is entitled to recover from said defendants said sum of \$5,757.93 so paid under protest, together with interest from January 25, 1871, for which it prays judgment.

Collins & Herron, for plaintiff in error. I. If the taxes complained of were illegally exacted, they may be recovered back. They were not voluntarily paid, but paid under compulsion. Sections 1 and 2 of the Statutes, 2 S. & C. 1151; *Baker v. Cincinnati*, 11 Ohio St. 534; 7 Wall. 128; 8 Wall. 209; *Deady*, 400.

II. The legislature of Ohio has no power, in raising revenue for general purposes, to levy a tax upon any business, pursuit, or avocation, or upon the receipts of any business. Its power in this regard is limited. The only basis of taxation in Ohio is property. The people of the state, in their Constitution, have purposely restricted the legislature from any capricious, partial, or unjust exercise of the taxing power. Constitution, art. 12, sec. 2, and art. 13, sec. 4; 3 Ohio St. 10; *Mays v. Cincinnati*, 1 Ohio St. 273; *Zanesville v. Auditor*, *et c.* 5 Ohio St. 589; *Hill v. Higdon*, 5 Ohio St. 246; 11 Wis. 42; 2 Black, 511; *Bank v. Hines*, 3 Ohio St. 1; *State v. Roberts*, 11 Gill & J. 506.

III. The act in question infringes upon the Constitution of the United States. It is an attempt to make the people of other states pay tribute to Ohio for the privilege of stringing lines of wire through the air, for the passage of an insensible fluid, or rather for the passage of ideas, in a manner that in no way hinders or annoys the people of Ohio, but rather blesses and enlightens them. It is more illiberal than duties levied upon goods that may happen to be borne through the state, or brought into the state. It is quite as much an obstruction of free commerce among the states as it would be to levy a poll-tax upon every person coming into the state or going out of it on commercial business.

Nay, it is an impediment to the free operations of the national government itself. In the movement of armies, the rapid concentration of troops, the early promulgation of orders from the head of the army, or of any other department of the government, such legislation by the states might prove a serious embarrassment and obstruction. *Crandall v. Nevada*, 6 Wall. 36; *Brown v. Maryland*, 12 Wheat. 449; *Weston v. Charleston*, 2 Pet. 449; *People v. Tax Commissioners*, 2 Black, 620; 7 How. 400, 414; *Ward v. Maryland*, 8 Wall. 432; *Gilman v. Philadelphia*, 3 Wall. 737; 15 Wall. 282, 284.

Forrest, Cramer & Mayer and Follett & Cochran, for defendant in

error. I. Corporations are not citizens within the meaning of section 2, article 4, of the federal Constitution, which guarantees to the citizens of each state "the privileges and immunities of citizens in the several states." That clause refers only to natural citizens, and not to artificial persons created by the laws of the several states, and a corporation created by one of the states can exercise none of the functions or privileges conferred by its charter in any other state of the Union, except by the comity and consent of the latter.

This is directly decided in the following cases, *q. v.*: *Paul v. Virginia*, 8 Wall. 168; *Ducat v. Chicago*, 10 Wall. 410; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 567.

Section 8, article 1, of the Constitution of the United States, which confers upon Congress the power "*to regulate commerce with foreign nations and among the several states*," &c., does not prevent the several states from affixing such terms as they please as a condition of allowing foreign corporations to do business in such states, and to make binding contracts there, or from forbidding such corporations from doing business in such states at all. *Gibbons v. Ogden*, 9 Wheat. 592; 8 How. 73; 8 Wall. 183; 8 Wall. 718; 15 Wall. 284; 18 Wall. 206; 21 Wall. 492; 10 Wall. 566; 8 Wall. 168; 21 Ohio St. 451.

II. Such taxation is not repugnant to section 2, article 12, of the Constitution of Ohio. 10 Wall. 410; 15 Wall. 284.

Again, this tax is not a tax upon property, but is a tax upon a franchise granted by the state, and is in no manner subject to the provision of section 2, article 12, of the Constitution of this state. *Society for Savings v. Crite*, 6 Wall. 594; *Protection Society v. Massachusetts*, *ib.* 611.

III. The payment, as described in the petition, is not an "involuntary payment," such as to entitle the plaintiff to sue for the recovery of the money. Sections 1, 2, 3, 4, 5, 6, 7, of the Act of May 1, 1862, and the Amendatory Act of April 13, 1865, S. & S. 171; *Mays v. Cincinnati*, 1 Ohio St. 278; *Marietta v. Slocumb*, 6 Ohio St. 471. See, also, *Awalt v. Eutaw Building Association*, 34 Md. 435; *Lester v. Baltimore*, 29 Md. 415; *Baltimore v. Lefferman*, 6 Gill, 425; *Fleetwood v. New York*, 2 Sandf. 475; *Knibbs v. Hull*, 1 Esp. 84; *Brown v. McKinally*, 1 Esp. 279; *Bilbie v. Lumley*, 2 East, 468, 469.

JOHNSON, J. Three questions are presented by the demurrer to the petition.

1. Was the payment of these taxes an involuntary payment, within the purview of the statute authorizing the recovery back of taxes illegally assessed and collected?

2. Is such tax on the gross receipts of a foreign telegraph company for the preceding year, where such receipts were mostly from messages pertaining to commerce, or on messages originating or terminating out of the state, or were chiefly earned on the company's lines outside of the state, a regulation or restriction of commerce between the states, and so in conflict with the Constitution of the United States?

3. Is the act (S. & S. 769-771) under which this tax is assessed and collected authorized by the Constitution of this state?

I. What constitutes such an involuntary payment of an illegal tax as will warrant an action to recover the same back under the statute (2 S.

& C. 1151), was considered in *Stephan, Treas. v. Daniels et al.* 27 Ohio St. 527, and in *Baker v. Cincinnati*, 11 Ohio St. 536.

In the light of those decisions, we are agreed that upon the facts stated in the petition the payment of these taxes was not voluntary.

An examination of the several provisions of this act (S. & S. 769-771) discloses the fact, that seven penalties and disabilities were incurred for making default in payment, amounting to a total exclusion of the company from transacting business within the state. The act provided no mode of redress nor gave the plaintiff a day in court.

The payment was made under protest, and with notice of this action, to avoid these penalties and disabilities. If the tax is illegal, we think this action may be maintained.

II. Is this act in contravention of the Constitution of the United States?

The petition states that the *gross receipts*, which the company was bound to return and upon which it was taxed, amounted to \$172,297, of which \$158,850.99 was for business "which originated or terminated at a point or points outside of the State of Ohio;" and it is alleged that these messages to or from different states pertained to commerce between the several states, and that a larger portion of said receipts were earned on the company's lines outside of the State of Ohio.

It is claimed that a tax on these *gross receipts* for the past year is the same as a tax on the messages themselves, and that a tax on messages between citizens of different states pertaining to commercial transactions is a state interference with the freedom of commerce among the states, and in conflict with the Constitution of the United States.

By section 8 of article 1 of this Constitution, the Congress possesses power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

In *Brown v. Maryland*, 12 Wheat. 448, Marshall, C. J., in speaking of the power of the states, in view of these provisions, says: "That the taxing power of the state must have some limits. It cannot reach and restrain the action of the national government within its proper sphere. It cannot interfere with any regulation of commerce. If the states may tax all persons and property found on their territory, what will restrain them from taxing goods in their transit through the state, from one port to another, for the purpose of re-exportation? Or what would restrain a state from taxing any article passing through it, from one state to another, for the purpose of traffic? Or from taxing the transportation of articles passing from the state itself to another state for commercial purposes?"

From this it was held, that a state law requiring an importer to take out license before he should be permitted to sell a bale of imported goods is void, and so is a state law requiring the master of a vessel engaged in foreign commerce to pay a certain sum on account of each passenger brought from a foreign country. *Passenger Cases*, 7 Howard, 278.

But a state may, in the exercise of its police power, forbid the sale by retail of spirituous liquors imported from abroad, or from another state. *License Cases*, 5 Howard, 504.

So "a special tax on railroad and stage companies, for every passenger carried out of the state by them, is a tax on the passenger for the privi-

lege of passing through the state by the ordinary modes of travel, and is not a simple tax on the business of the corporation." *Crandall v. Nevada*, 6 Wall. 35.

Clifford, J., in *Gilman v. Philadelphia*, 3 Wall. 737, says: "Right of intercourse between state and state was a common law right, and, as such, was fully recognized and respected before the Constitution was formed. Those who framed the instrument found it an existing right, and regarding the right as one of high national interest, they gave to Congress the power to regulate it," &c.

The United States supreme court set aside an act of the legislature of Pennsylvania (*Erie R. R. v. Penn.* 15 Wallace, 282), holding that —

"A statute imposing a tax upon *freight* taken up within the state and carried out of it, or taken up without the state and brought into it, was repugnant to that clause of the federal Constitution giving to Congress the power to regulate commerce between the states."

This decision was founded on the case of the *State Freight Tax*, 16 Wallace, 232, which arose on a law of the State of Pennsylvania, to provide additional revenue for the commonwealth.

This act required certain transportation companies doing business within the state to report the number of tons of freight carried, and compelled them to pay a tax of *so much per ton* on the amount carried.

The whole subject underwent a thorough discussion, and the conclusion was reached as above stated.

This conclusion rests on the ground carefully stated by the court, that it was a tax on the *freight* carried, and not on the aggregate *business*, nor *franchises*, nor *property* of the transportation companies. It was, in the view the court took of the law, a tax on the *thing carried*, and for that reason was a tax on commerce.

The difference between a direct tax on an *article* of commerce, and a tax on the company carrying, by taxing its property, franchises, or business, is clearly shown by the case of *The Reading R. R. Co. v. Pennsylvania*, 15 Wall. 284, where it was held, that "a statute of a state imposing a tax upon the *gross receipts* of railroad companies is not repugnant to the Constitution of the United States, though the gross receipts are made up in part from freights received for transportation of merchandise *from the state to another state, or into the state from another*. Such a tax is not a regulation of inter-state commerce."

The court say: "It is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution." "We think it may safely be asserted that the states have authority to tax the estate, real or personal, of all their corporations, including carrying companies, precisely as they may tax similar property which belongs to natural persons, and to the same extent. We think also that such taxation may be laid upon a valuation, or may be an *excise*; and that in exacting an excise tax from their corporations, the states are not obliged to impose a fixed sum upon the franchises, or upon the value of them, but they may demand a graduated contribution, proportioned either to the value of the privileges granted, or to the extent of their exercise, or to the results of such exercise."

Again: "If the tax be upon the *instrument*, such as a stage-coach, a

railroad car, or a canal or a steamboat, its tendency is to increase the cost of transportation; still it is not a tax upon transportation or upon commerce, and it has never been seriously doubted that such a tax may be laid."

For these reasons it was said a tax on *gross receipts* for transportation was not a tax on *articles* of commerce, but upon the *fruits* of commerce after they had reached the treasury of the company.

To the same effect is the case of *The Delaware R. R. Tax*, 18 Wallace, 206, and *Erie Railway Co. v. Pennsylvania*, 21 Wall. 492.

In the case of *The Delaware Railroad Tax*, 18 Wall. 231, the supreme court say: "A tax upon a corporation may be proportioned to the income received, as well as to the value of the franchise granted or the property possessed." And in *Erie Railway Co. v. Pennsylvania*, 21 Wall. 492, the court sustained the validity of the law of Pennsylvania, imposing a tax of three fourths of one per cent. upon the gross receipts of the Erie Railway, although but forty-two miles of its whole line of four hundred and fifty-five miles lay within the state.

By a statute of Massachusetts, a tax of four per cent. upon all premiums charged or received on contracts for insurance of property was imposed upon all companies foreign to the United States; a tax of two per cent. upon corporations organized under the laws of any other state than Massachusetts, while only one per cent. was imposed upon corporations organized under the laws of Massachusetts.

The supreme court of the United States held that this "law of Massachusetts is no violation of the federal Constitution." *Liverpool Ins. Co. v. Massachusetts*, 10 How. 573.

In this case it was held that the business of insurance was not commerce, though carried on between citizens of different states, and therefore such business might be taxed by the states.

This subject has recently been before the supreme court in *Welton v. State of Missouri*, 1 Otto, 275; *Henderson et al. v. Mayor of New York*, 2 Otto, 259, and *Chy Lung v. Freeman et al.* 2 Otto, 275.

Welton v. Missouri involved the validity of a license tax on peddlers, dealing in articles not the product or growth of the state.

It was held that such a tax was in effect a tax on goods, wares, and merchandise of other states brought into the state for sale, and therefore was a discrimination that interfered with freedom of commerce between the states.

It was further held in that case, that the non-action of Congress on the subject of commerce between the states was equivalent to saying that it should be free, and that state legislation, of a restrictive character, against articles of trade and traffic between the states, by reason of their foreign origin, is an interference with that freedom, and therefore unconstitutional. Commerce between the states relates to trade in articles of property. Telegrams or correspondence by any other method, although between citizens of different states, and although it may relate to commercial transactions, are not commerce.

They are instruments or aids to facilitate commerce. Like the vehicle on which goods or persons are transported from state to state, they may be indispensable to a successful prosecution of trade. These instruments of commerce have always been subject to state taxation.

Whether, if Congress should legislate on this subject and make the telegraph lines part of the postal system, or declare them indispensable to trade and commerce between the states, and so exempt messages relating to commerce from state taxation, such a tax will be valid, we will not here inquire.

This law does not impose a tax on messages, but on the gross receipts of a previous period of time, and so within *The Delaware R. R. Tax*, 18 Wall., cited above.

III. Is this statute (S. & S. 769-771) in conflict with the Constitution of the state?

This plaintiff is a foreign corporation, doing business within the state, with its principal office in another state. Its property within the state is taxed as other property.

The right of the state over such corporations, and its power to impose upon them terms and conditions upon which they may transact business within the state, as well as the general power of taxation, is involved in this inquiry.

The power of the state to collect taxes for public purposes is an inherent and indispensable incident of sovereignty. Without it no civilized state could discharge its functions.

This power would exist without a written Constitution. The object of constitutional provisions is to regulate its exercise by such limitations and restrictions as will protect the people against unjust or arbitrary action of the governing power. *McCullough v. Maryland*, 4 Wheat. 316; *Providence Bank v. Billings*, 4 Peters, 519; *North M. R. R. v. McGuire*, 20 Wall. 46; *Debolt v. O. L. & Trust Co.* 1 Ohio St. 563; Cooley on Taxation, 8; Cooley on Const. Law; The Federalist, Nos. 30-35. The Constitution (art. 2, sec. 1) provides, that "the legislative power of the state shall be vested in the general assembly."

The power to raise revenue for public purposes, being a legislative power, is thus expressly committed to the general assembly.

It is a grant of general power of taxation.

Limitations and restrictions on its exercise are to be found in other provisions of that instrument, and in the federal Constitution.

Thus article 12, which relates to taxation, is not, as seems to be supposed, a delegation of authority to raise revenue, but a limitation of that power as conferred by article 2, section 1.

In *Hill v. Higdon*, 5 Ohio St. 250, it is said: "In our present Constitution, as well as in the former, the general grant of legislative authority includes the power of taxation in all its forms. Restrictions upon its exercise are to be looked for in other parts of the instruments."

As a deduction from that proposition, the court sustains the validity of assessments in cities and towns. If article 12 was the source of the taxing power, this assessment, being in effect a tax, would have been invalid.

So in *Reeves v. Treasurer of Wood County*, 8 Ohio St. 333, it was held, that the power to levy and collect a local assessment was a branch or part of the general authority of the legislation which exists in the state, as well before as after the adoption of the Constitution of 1851, and while it was a species of tax, yet it was not objectionable, because it was assessed in

proportion to benefits conferred, and not *ad valorem*, as required by article 12, section 2.

This point was directly considered in *Baker v. Cincinnati*, 11 Ohio St. 534, under a law of the state which conferred upon cities and towns power to license shows and other performances, and to charge such sums of money as the council may think fit. Under an ordinance for that purpose, Baker was charged \$1 for issuing a license to him, and \$63.50 for the privilege of running a theatre for six months, which was paid into the city treasury.

It was claimed there, as it is here, that this tax was prohibited by article 12, section 2, which provides for taxation by a uniform rule on all kinds of property, according to its true value in money.

It was argued that property, and *property alone*, is the *sole basis* for raising revenue, and that the legislature had no power to collect revenues, or authorize municipal corporations to do so, by a tax on any business, pursuit, or avocation.

A remark, not necessary to the decision, is found in the opinion of the judge, in *Exchange Bank v. Hines*, 8 Ohio St. 10, and is cited in support of this argument.

In reply, Gholson, J., says: "The legislative power of the state is found in article 2, section 1, and includes all the power which the objects of the state government may require, and we must look to other provisions of the Constitution to ascertain to what extent legislative discretion is qualified or restricted; that article 12, section 2, is not a *grant of power*, but a *regulation of power already granted in the first section of the second article*."

In that case, the court conclude that the power to authorize *licenses* is untouched by the Constitution, except in case of intoxicating liquors.

How far, and to what extent, this power may be used to raise revenue in that mode, is mooted, but not considered, beyond the case before the court; but it is said: "It may be admitted that it could not be employed as a *mode of taxing property* without reference to the uniformity or equality required by section 2, article 12."

It was said the power to collect a tax on a license, the amount of which was in the discretion of the council, was analogous to the power to make assessments in the cases already cited; and the fact that the amount collected was greater than the cost of issuing the license, or that it went into the public treasury as a tax, did not affect its validity.

In speaking of section 2, of article 12, the learned judge says (p. 541): "The things in contemplation were *property* of every possible description, and an equal and uniform tax on that property, according to its true value in money. If there be a *species of taxation*, or *subject matter* of taxation, not embraced in that section, there is nothing in it by which they are prohibited or excluded. Laws taxing *property* must certainly conform with that section."

"A license cannot be regarded as property;" and it is added: "Now neither of these sections in terms prohibits the granting of licenses and making a charge therefor, nor the imposition of a tax on a license."

In *Zanesville v. Richards*, 5 Ohio St. 590, the court is careful to add to the opinion that while it extended to all laws providing for taxation within

the meaning of that term as used in the Constitution, it by no means followed that it covered "the whole ground included in the limits of the taxing power."

This article came under review in *The Cincinnati Gas Co. v. The State*, 18 Ohio St. 238, where it was held that a *pro rata* assessment according to valuation on the property of the gas companies in the state, to pay the salary of the state inspector of meters, was not in violation of article 12, section 2.

It is there said this section relates to taxes to be raised on *property*, and that this is in the nature of a charge upon a *business*. It is said it does not follow that because the state is compelled to tax all property by a uniform rule, that it is therefore cut off from all power to lay assessments and charges for exceptional and special purposes; and "an express direction to impose a tax by a uniform rule does not necessarily limit the power of taxation upon that which is not property."

Again, under the police power of the state, it will not be denied that laws are valid which impose fines, penalties, and forfeitures on classes of acts denominated crimes and misdemeanors, and which make these punishments a source of revenue.

The money or property arising from these form part of the public revenue. They are in effect taxes on obnoxious acts, practices, and occupations.

So license taxes for the privilege of exhibiting shows, or to keep ferries, taverns, &c., and charges incident to inspection laws, are in the nature of taxes on trade or business.

The Hamilton County Fee Bill (67 Ohio L. and 68 Ohio L.) required all fees to be paid into the treasury, and provided for the payment of salaries to the officers out of the treasury.

In *The State v. The Judges*, 21 Ohio St. 1, the invalidity of this act was claimed on the ground, among others, that article 12, section 2, required that funds raised to carry on the government should be raised by a uniform tax on property, and forbids the methods of justice, or the process of record of titles, or the functions of county officers being taxed.

In case of a surplus of fees over salaries to the amount of \$5,000 in either office, that surplus under the law went into the general funds of the county.

The court say, if, in the practical operation of the act, the effect should be to leave a surplus for the use of the county, which is contingent, this would result from the difficulty found in prescribing such rates of charges as to make the receipts equal to the salaries. It is held that the mode of paying public officers by fees exacted of suitors is not in conflict with article 12, and "if these exactions are called taxes, they become none the less such as to those upon whom they are imposed by being paid to the officer, than if paid into the public treasury." This law is an instance of the legislative power to levy taxes other than on property.

All fees are taxes on suitors, often quite onerous, for the privilege of using the courts to decide their controversies. Generally they go directly to the public officers, as their compensation for services rendered; but this case decides they may be paid directly into the public funds, and the officers may be compensated by salaries, and any surplus of fees over sala-

ries becomes public revenue for county purposes, in lieu of taxes on property.

Many of the states have constitutional provisions similar to ours, requiring uniformity in taxing property according to value, and these provisions have been under review by their highest courts.

In *Glasgow v. Rouse*, 43 Mo. 479, it was said: "The Constitution enjoins a uniform rule as to the imposition of taxes on all property, but does not abridge the power of the legislature to provide for revenue from other sources.

"Outside of the constitutional restriction, the legislature judge of the propriety of taxation, and define the sources of revenue as the exigencies of the case may require."

In California, where the constitutional provision is almost a copy of ours, it was held, that a tax on business graduated by sales on monthly business was not forbidden, on the ground that it was not a tax on the *goods* but on the business, and if uniform on all business of that kind was unobjectionable. *Sacramento v. Crocker*, 16 Cal. 119.

In Georgia, in the case of *The Home Ins. Co. v. The City of Augusta*, 50 Geo. 548, several cases in that state are cited to the effect that a tax on professions was not in conflict with a provision that "Taxation on property shall be *ad valorem*, and uniform on all species of property taxed."

Therefore it was held that the city of Augusta might, under legislative authority, exact a fixed sum, without reference to capital or business, for the privilege of doing business, such sum not being a tax on property. To the same effect are *Adams v. Mayor*, and *State v. Crawford*, 2 Head (Tenn.), 363, 460.

The same doctrine is affirmed in *Walcut v. The People*, 17 Mich. 68, and *Kitson v. Mayor*, 26 Mich. 325; *Gilkerson v. Frederick Justices*, *Slaughter v. Commonwealth*, 13 Grattan, 767; *Ould & Carrington v. Richmond*, 26 Grattan, 464; *Carter v. Dow*, 16 Wis. 298; *Municipality v. Du-bois*, 10 La. 199.

These cases from other states are cited to support our principal proposition, that the power to levy taxes is a part of the legislative authority found in article 2, section 1, and that under it taxation in any of the modes known and practised prior to the Constitution of 1851 still exist, except so far as restricted by other provisions of that instrument. Whether these cases which have been cited from other states would be followed in Ohio, we need not now inquire. To the extent that they affirm that the provision for an *ad valorem* system of taxation on all property in the state is not a surrender of the general power to raise revenue by other modes than upon the property of the state, we approve them.

The power to raise necessary funds to defray the legitimate expenses of government is vital to the existence of the state. To this extent it can neither be surrendered nor granted away.

Limitations and restrictions on this power found in the Constitution are wise safeguards, to prevent its abuse, and to that end should receive a liberal construction; but we apprehend the canons of construction will not warrant the presumption that an acknowledged authority in the state has been surrendered by a wise limitation which relates only to the mode of taxing property, and which does not purport to limit the legislative

authority as to other methods of providing public revenue, much less by such construction to abridge the general police power of the state. The object of article 12, section 2, was to secure uniformity of taxes on all the property of the state not specially exempted.

It embodies the main features of "An act for levying taxes on all property according to its true value in money" (2 Curwen, 1260), known as the Tax Law of 1846.

No one ever supposed that the adoption of that act in 1846 was a surrender by the state of the general taxing power, or of the acknowledged authority to regulate or control any special or objectionable business by fees, fines, penalties, and charges, which become a source of revenue.

To this branch of legislative authority belongs the power to create corporations, and to prescribe the terms and conditions upon which they may exercise their franchises. The power over foreign corporations is equally clear. They may be excluded from the state altogether, or admitted on such terms as the state may prescribe. They are not *citizens*, within the meaning of the federal Constitution, "entitled to all the privileges and immunities of citizens in the several states."

They can exercise none of their powers or franchises within this state, except by comity or under legislative consent. *Bank of Augusta v. Earle*, 13 Pet. 519; *Paul v. Virginia*, 8 Wall. 168; *Ducat v. Chicago*, 10 Wall. 410; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 567; *Lafayette Ins. Co. v. French*, 18 How. 404; *The Fire Dept. v. Noble*, 3 E. D. Smith, 440; *De Groat v. Van Duzen*, 20 Wend. 390; *Commonwealth v. Milton*, 12 B. Mon. 212; *Fire Dept. v. Helfenstein*, 16 Wis. 136. Such consent may be granted on such terms and conditions as the state may impose.

In *Paul v. Virginia* it is said: "The state may exclude foreign corporations entirely; it may restrict it to particular localities, or exact such security for the performance of its contracts as will best promote the public interest. The whole matter rests in its discretion."

Ducat v. Chicago, 48 Ill. 172, afterward affirmed in 10 Wallace, 410, is in point, and involved the validity of an act of Illinois imposing a license fee, and a tax of two per cent. on all premiums, received by foreign insurance companies doing business within the state.

The validity of this act was challenged: 1. Because the Constitution, like ours, provided for an *ad valorem* system of taxation; and 2. Because this tax on premiums received by foreign corporations was an unjust discrimination in favor of domestic corporations, and an interference with business between the states.

It was held valid by the supreme court of Illinois on both grounds; that court holding, that although taxes on property must be uniform, yet a tax on gross premiums of foreign insurance companies was not a tax on persons or property of the corporators.

The supreme court of the United States affirmed this judgment, following *Paul v. Virginia*, *supra*.

To the same effect are *The Cin. Mut. Health Ass'n Co. v. Rosenthal*, 55 Ill. 85; *The Fire Dept. v. Noble*, 3 E. D. Smith, 440; *The Fire Dept. v. Wright*, 3 E. D. Smith, 453.

These last cases were affirmed by the court of appeals of New York.

If, therefore, under the power of taxation, or the general authority to

exclude foreign corporations, or regulate the terms on which they may do business, or under both combined, this law can be sustained, it is our duty so to declare; for unless it manifestly contravenes the Constitution, the judicial department is not warranted in declaring it void.

We have seen that the fact, that revenue results from the exercise of legislative power, as in cases of fines, licenses, &c., and that the law is in effect and practically a tax, does not invalidate it.

As was said in *Baker v. Cincinnati*, "There is no magic in names."

By the seventh section of this act (S. & S. 770), if the amount assessed "shall remain due and unpaid to the treasurer of the county for the period of twenty days after the time provided by law for the payment thereof, it shall be unlawful for any person or persons, or corporations, to act as agents, or do or transact any business for such company so in default, of such county, until said taxes, interest, and penalties are fully paid." Not only this, but heavy penalties are imposed on persons or railroad companies for acting for or transacting business for such defaulting corporation. These provisions amount to an exclusion of business from the state.

They are the conditions upon which the corporations named in the act are allowed to do business within the state.

Whether this tax is warranted by a wise public policy, and whether it is too onerous, are questions for the legislature and not for the courts.

The burden is the price paid for transacting their business within the state. Having their principal office in another state, where all their property, except the little that may be within the state, is located, and composed of corporators also beyond the state, they would otherwise be exonerated from an equal share of the public burdens.

Any regulations imposed on such corporations, not amounting to a regulation of commerce, nor to a tax on the property of a corporation within the state, imposed as a compensation to be paid to the state for the privilege of doing business within its territory, is, we think, within the legislative power of the general assembly.

The unbroken current of judicial authority is in support of such a power in the state, and in our opinion public policy demands its exercise.

Corporations have multiplied to an almost indefinite extent in every state, not only to do business at home, but in other states. In our own state domestic corporations are subject to legislative control, and their stockholders are individually liable; but in case of foreign corporations no such control exists, and their stockholders are beyond state authority.

These artificial beings control a large part of the active wealth of the country.

They exercise a concentrated power for good or evil, far greater than natural persons possibly can.

If such organizations, composed of persons residing out of the state and clothed with loose and unguarded powers by other states or nations, can exercise their franchises within the state without sharing the public burdens of that government which protects them, and free from the control and responsibility to which domestic corporations are subject, it is easy to see that the day is not far distant when, with these superior advantages, the most important business interests in the state will have passed beyond its control.

Judgment affirmed.

COURT OF APPEALS OF VIRGINIA.

(To appear in 28 Grattan.)

CONFISCATION OF PROPERTY OF MUNICIPAL CORPORATION. — PRACTICE. — JUDGMENT. — DEFAULT. — FAILURE OF COUNSEL TO ENTER APPEARANCE WHERE JUDGE HAS EXPRESSED BIAS.

FAIRFAX v. CITY OF ALEXANDRIA.

1. In a proceeding to confiscate property of a person charged to be in rebellion, the directions of the attorney general are, that the method of seizure of the property shall be conformed as nearly as may be to the state law, if there be such. When therefore the proceeding is to confiscate debts due from a municipal corporation, the notice to the debtor must be upon the mayor or other officer named in the Virginia statute; and notice given to the auditor of the corporation is of no effect, and the judgment based upon such notice is null and void.
2. On such a proceeding against F., the counsel of F. does not enter an appearance for him, because in three cases against the same party, before the same judge, he was informed by the judge from the bench, that it was the rule of his court not to allow an appearance and defence by rebels and traitors; and in these cases the appearance and defence were stricken from the cases; and this a short time before the last case was acted on. The counsel was not in default for failing to enter an appearance for F.; and the decree of confiscation is void and of no effect.

THIS is a writ of error to a judgment of the circuit court for the city of Alexandria, rendered on the 25th day of May, 1875, in an action of covenant, wherein the plaintiff in error, Orlando Fairfax, was plaintiff, and the defendant in error, the City Council of Alexandria, was defendant.

The action was brought upon four bonds of the said corporation, amounting together to the principal sum of \$8,700, which bore interest at the rate of *six per centum per annum*, payable half yearly, of which principal the sum of \$3,500 was redeemable on the 10th day of July, 1861, and the residue, \$5,200, was redeemable on the 1st day of January, 1870. The only issues joined in the case were upon the pleas of "covenants performed" and "covenants not broken," to which the plaintiff replied generally; and the parties waiving a trial by jury of the issues joined, and submitting the cause to the determination of the court upon a statement of agreed facts filed and made a part of the record in the cause, and the matters of law arising thereon being argued, it seemed to the court, upon the whole matter therein contained, that the law was for the defendant, and judgment was rendered accordingly.

The defence to the action was, that the said bonds, or the principal and interest of the debt due thereon, were confiscated under the act of Congress of July 17, 1862, by the sentence of the district court of the United States for the Eastern District of Virginia.

The agreed statement of facts is substantially as follows:—

In February, 1864, Dr. Orlando Fairfax, the plaintiff in this suit, was residing in Richmond, Virginia, the capital of the Confederacy, and had been living there since the commencement of the war, having, up to said commencement, been a citizen and resident of the city of Alexandria, Virginia. He lived in Richmond till the close of the war, and whilst thus in

Richmond, continuously during the period mentioned within the Confederate lines, he held four bonds, or evidences of indebtedness of the city of Alexandria, one for \$2,000, one for \$500, one for \$1,000, and one for \$5,200, all bearing interest at the rate of *six per centum per annum* on their face, the three first being due and payable on July 10th, 1861, the last one (\$5,200) being due and payable January 1st, 1870.

At no time during the war were these bonds or evidences of indebtedness out of the personal possession and custody of Orlando Fairfax, the plaintiff in this cause, in the city of Richmond, Virginia. The bonds aforesaid, in the declaration mentioned, were in the words and figures following: (A copy of the bonds and indorsements is set out in the record as part of the facts agreed, but it is unnecessary to set out the same here.) Three of which bonds had been regularly and properly assigned and transferred to Dr. Orlando Fairfax, the plaintiff in this cause, on the books of the corporation for value, and had passed into his possession and ownership on the 23d day of November, 1858, and the fourth one for \$5,200, due January 1st, 1870, and bearing interest from July 1st, 1858, and numbered 35, was made and executed and delivered to him in his own name by the defendant for value received.

That on the 30th day of November, 1866, the said plaintiff served a notice on the auditor of the said defendant, who was authorized as agent of the said defendant to pay the interest on said bonds whenever it fell due, not to pay any interest which should thereafter accrue to any but himself or his authorized attorney. That prior to the commencement of this suit, and subsequent to January 1st, 1870, the plaintiff, by his authorized attorney and agent, John Johns, Jr., repeatedly demanded of the defendant the payment of the principal of said bonds, and the accrued interest thereon, and payment of the same was refused by defendant, and the said amounts have never been paid to the plaintiff.

That on the 25th day of July, 1865, the plaintiff received and accepted the pardon of the President of the United States. (A copy of which pardon is set out in the record but need not be repeated here.)

That between March 14th and April 11th, 1864, an attorney at law appeared before John C. Underwood, judge of the district court of the United States for the Eastern District of Virginia, at Alexandria, as counsel, and endeavored to procure from him a reversal of the decree of confiscation entered in favor of the United States against Dr. Orlando Fairfax's (the plaintiff in this cause) house and lot situated on Cameron Street, in the city of Alexandria. The judge, the honorable John C. Underwood, informed the attorney from the bench that he could allow no appearance for any "rebel" or "traitor;" that this was the rule of his court as before that publicly announced, and that he had in every case ordered the appearance of counsel for, and the answer of "rebels," to be stricken from the files. The records of three confiscation cases, tried in the United States district court for the District of Virginia, before the said John C. Underwood as judge, between March 10th, 1864, and May 4th, 1864, in which the United States was plaintiff, and Dr. Orlando Fairfax (the plaintiff in this cause) was defendant, show that in each case the above rule and practice of the court, as proven by said attorney, that is to allow no appearance for any "rebel" or "traitor," was carried out against

Dr. Orlando Fairfax, the defendant in these cases and the plaintiff in this, and that the appearance of his attorney, and his answers in those three cases, tried and determined between March 10th, 1864, and May 4th, 1864, were, by order of said United States district court at Alexandria, stricken from the files, on the ground that said Dr. Orlando Fairfax was within the Confederate lines and a rebel.

That the aggregate or principal of said bonds is \$8,700, upon which interest has accrued as to \$3,500 thereof from January 15, 1867, and on \$5,200 thereof from July 1, 1867, on each sum at the rate of *six per centum per annum*. That on the 4th day of May, 1864, the United States district court, for the District of Virginia, in a cause in confiscation therein pending (but not one of the confiscation causes heretofore referred to) in the name of the "United States against all the right, title, and interest of Dr. Orlando Fairfax in and to eighty-seven shares of the stock of the corporation of Alexandria, in the Eastern District of Virginia, together with all the moneys due him and becoming due from the said corporation for dividends upon said stock," passed a sentence of condemnation condemning said stock as forfeited to the United States, the record of which sentence is in the words and figures following, to wit: (Here follows the said record, which will not be set out here in full, but only the substance of such portions as seem to be material to be here stated.)

The libel of information was filed on the 24th of February, 1864, by L. H. Chandler, United States attorney for the Eastern District of Virginia, in behalf of the government of the United States, against all the right, title, and interest of Dr. Orlando Fairfax in and to eighty-seven shares of the stock of the corporation of Alexandria, together with all the moneys due him and becoming due from the said corporation for dividends upon said stock, and against all persons lawfully intervening for their interest therein. The said libel contains nine articles, charging the said Fairfax with being the owner of the said stock, and with having forfeited the same by violating, as therein mentioned, the provisions of the act of Congress approved on the 17th day of July, 1862, entitled "An act to suppress insurrection, punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," and by disregarding the proclamation of the President of the United States, issued on the 25th day of July, 1862, "warning all persons within the contemplation of the sixth section of the said act of Congress to cease from participating in, aiding, countenancing, and abetting the existing rebellion against the government of the United States." The last two of the said articles are in these words:—

"VIII. That the said property herein described has been seized by the United States marshal for the District of Virginia, in compliance with instructions issued by the attorney general to district attorneys of the United States, and by virtue of the fifth section of the act approved on the 17th day of July, in the year of our Lord 1862, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes."

"IX. That by reason of the premises, the property herein described became and was forfeited to the United States, and ought to be condemned to their use."

And the conclusion of the libel is in these words: "Wherefore prayer

is hereby made to your honor that process of monition may issue against the owner and owners of the property herein described, and against all persons interested or claiming an interest therein, warning them at some early day, to be therein named, to appear and answer this libel of information; and the owners of said property being absent and non-resident, prayer is further made for order of publication in the usual form, and for such further and other relief as to law and justice may appertain, and as this court is competent to give in the premises.

“L. H. CHANDLER, *U. S. Attorney.*”

The seizure referred to in the eighth article of said libel was made under a warrant of the said attorney, dated on the 22d of February, 1864, addressed “To the marshal of the United States for the Eastern District of Virginia,” directing him “to seize all the right, title, and interest of Dr. Orlando Fairfax in and to eighty-seven shares of the stock of the corporation of Alexandria in the Eastern District of Virginia, together with all the moneys due him and becoming due for the said corporation for dividends upon said stock, together with all the improvements, buildings, rights, privileges, appurtenances, and other hereditaments to the same belonging, or in anywise appertaining, and all right, title, interest, and estate of Dr. Orlando Fairfax therein, as proceedings are to be instituted to secure the confiscation of the same to the use of the United States under the above entitled act,” and directing him to report the said seizure to the said attorney when the same shall have been made. A return was made on said warrant in these words:—

“UNITED STATES MARSHAL’S OFFICE,
Alexandria, Va., Feb. 23d, 1864.

“I certify that I have seized the within described property, and given notice to R. Johnson, Esq., auditor of the corporation of Alexandria, as within directed.

JOHN UNDERWOOD, *U. S. Marshal.*”

The said warrant and return were filed with the libel, and on the 26th of February, 1864, an order was made in the cause, which, after setting out the style of it, is in these words:—

“On reading and filing the libel in this case, the court orders that process of monition issue as prayed, and appoints the first Monday in April, 1864, and the court-room in the custom-house, in the city of Alexandria, as the time and place of trial of this cause; and also orders that notice of said time and place of trial, and of the substance of the said libel, be given by publication thereof in the Virginia State Journal, a newspaper published in the city of Alexandria, and also by posting up the same at the court-house door; and that proclamation of the pendency of this suit be made by the marshal at the court-house door two times weekly, until the day of trial.

“JOHN C. UNDERWOOD, *District Judge.*”

Process of monition was accordingly issued on the same day by the clerk of the said court, directed to the marshal of said district, who made his return thereon, dated April 4, 1864; that he had “caused the notice to be published, posted, and proclaimed as within commanded.” Copies of said process and return, and of the evidence of the publication and

posting thereof, were made a part of the record. And afterwards, to wit, on the 4th day of May, 1864, a judgment of confiscation was entered in the cause, which, after setting out the style of it, is in these words:—

“The papers in this cause having been theretofore returned, the usual proclamation having been made, the default of all persons being duly entered, and due deliberation being had on the pleadings, it is thereupon, on motion of L. H. Chandler, attorney for the United States, ordered, adjudged, sentenced, and decreed by the court that the personal property mentioned and described in the libel in this cause be, and the same accordingly is, confiscated and condemned as forfeited to the United States. And upon like motion it is further ordered, adjudged, and decreed that the clerk of this court issue a writ of *venditioni exponas*, &c.

The said writ was accordingly issued by the clerk and returned by the marshal, showing the gross amount of sale to be \$1,737, which was paid to the clerk by the marshal.

The papers and proceedings aforesaid constitute the record of the sentence of condemnation aforesaid, of which an official copy is made a part of the case agreed, after the insertion of which the agreed case proceeds:—

“The said eighty-seven shares of stock mentioned and described in said record are the shares or bonds evidenced by the certificates or bonds which are heretofore set forth, and which form the basis of the present action. Under said sentence of condemnation the said stock was sold by the marshal, and by him the stock so sold was transferred on the books of the auditor of the corporation to the purchasers respectively. Said transfers are in the words and figures following.” (They are set out in the case agreed, but need not be here inserted.) “The said transfers have been recognized by the defendant as valid transfers of said stock, and the defendant has issued to said confiscation purchasers, or to their assigns, certificates of stock of like tenor and amount, which are still outstanding. The several charters of the town and city of Alexandria, Virginia, and the ordinances of said town and city, are made part of this agreed statement, the same as if embodied herein at length.

“And it is further agreed, that if from the facts stated above the law shall be in favor of the plaintiff, the court shall enter judgment for the amount and interest above stated. But if the court shall determine that the law is for the defendant, judgment shall be entered accordingly.”

The circuit court having determined, as before stated, that the law upon the facts agreed as aforesaid is for the defendant, and rendered judgment accordingly, the plaintiff applied to this court for a writ of error to the said judgment; which was awarded accordingly.

Wattles & Johns, for the appellants.

Beach & Stuart, for the appellee.

MONCURE, P., delivered the opinion of the court.

If the district court had no jurisdiction to render the decree of confiscation, relied on as a defence by the defendant in this case, then it is admitted by the counsel on both sides, and is clearly shown by authority, that the said decree is void, and must be so regarded, even in a collateral proceeding such as this is.

It is also admitted by the counsel on both sides, and is clearly shown by authority, that as the proceeding in this case is *in rem*, to give the

court jurisdiction of the case, the *res* must have been brought by *seizure* within the power and control of the court.

Was it so brought?

"By the seizure of a thing," said the supreme court in *Pelham v. Rose*, 9 Wall. 103, 106, "is meant the taking of a thing into possession, the manner of which, and whether actual or constructive, depending upon the nature of the thing seized. As applied to subjects capable of manual delivery, the term means caption, the physical taking into custody."

"In the case at bar," further said the court, "a visible thing, capable of physical possession, is the subject of the libel. It is the promissory note of Pelham which constitutes the *res*, against which the proceeding is instituted, and not a 'credit' or debt, which the note is supposed by the defendant's counsel to represent. Whether by any proceedings, under the Act of July, 1862, the indebtedness of a maker on a negotiable promissory note, before its maturity, could be reached without the possession of the note itself, is not a question presented for our consideration. It is sufficient that the object of the present libel is to reach the note itself. This appears at every stage of the proceedings," &c. "To effect its seizure, as required by the act, it was therefore necessary for the marshal to take the note into his actual custody and control." See also *Pelham v. Way*, 15 Ib. 196.

That a credit was liable to "seizure," within the meaning of the Act of July 17th, 1862, clearly appears, not only from the express language of the act itself, but also from various adjudications upon it by the supreme court of the United States.

First, as to the express language of the act. The fifth section enacts: "That to insure the speedy termination of the present rebellion, it shall be the duty of the President of the United States to cause the seizure of all the estate and property, money, stocks, *credits*, and effects of the persons hereinafter named," &c. And the sixth section makes it the duty of the President "to seize and use as aforesaid all the estate, property, moneys, stocks, and credits of persons within any state or territory," &c.

Secondly, as to the decisions of the supreme court upon the subject: they are *Miller v. United States*, 11 Wall. 268; *Brown v. Kennedy*, 15 Ib. 591.

But as a credit is incapable of being *actually* seized, it must be *constructively* seized, if seized at all.

How may it be constructively seized?

The act of Congress does not prescribe the mode, as it might have done; and, if it had done so, no doubt a seizure in that mode would have been sufficient, and perhaps the only seizure that would have been sufficient.

But the act of Congress, as we have seen, makes it the duty of the President of the United States to seize, or cause the seizure of all the estate, property, moneys, stocks, and credits, &c., as aforesaid; thus, as it seems, making it his especial duty to prescribe rules in regard to seizure where doubt or difficulty might arise on the subject. Accordingly, it is stated in 11 Wall., pp. 273 and 274, that "In order to carry out these acts of August 6th, 1861, and July 17th, 1862, the President charged the attorney general with the superintendence and direction of all proceedings

under them, and authorized and required him to give to the district attorneys and marshals such instructions and directions as he might find needful and convenient touching all seizures, proceedings, and condemnations under them." Accordingly, on the 8th of January, 1863, the attorney general issued general instructions on the subject to district attorneys and marshals. Among these instructions the following were given with regard to the seizure of property:—

"All seizures will be made by the marshal of the proper district, under written authority to be given him by the district attorney, specifying with reasonable certainty the property to be seized, and the owner whose right is sought to be confiscated.

"When the marshal has seized any property under such authority, he will, without any unnecessary delay, make a true return thereof in writing to the district attorney.

"Where the state law directs the method of seizure, it shall be conformed to as nearly as may be consistent with the objects of the acts of Congress. If the thing to be seized be *personal* property, it ought to be *actually seized and safely kept*; if real estate, the marshal ought to seize all the right, title, interest, and estate of the accused party, giving notice in writing of the seizure to the tenants in possession, if any; if stocks, or other intangible property, the marshal ought (if there be no specific method prescribed by the state law) to describe the property as plainly as he can in his return, and leave the court to determine the sufficiency of the seizure."

The subject of the proceeding in this case, viewing it most favorably for the defendant, was a "credit." The method of seizure of such a subject, as directed by the state law, is that prescribed by the law in regard to attachments; and where the debtor is a corporation, as in this case, notice of the seizure ought to be given to the person on whom by law process against the corporation is required to be served.

By the state law, Code of 1860, chapter 151, section 7, page 647, it is enacted that an attachment "shall be sufficiently levied in every case by a service of a copy of such attachment on such persons as may be designated by the plaintiff in writing, or be known to the officer to be in possession of effects of, or to be indebted to, the defendant; and as to real estate, by such estate being mentioned and described by indorsement on such attachment." See also sections 12 and 13 of the same chapter, *Ib.* page 648. In regard to the execution of process on a corporation, it is enacted in section 7 of chapter 170, page 707 of the same Code, that "it shall be sufficient to serve any process against, or notice to, a corporation, or its mayor, rector, president, or other chief officer, or in his absence from the county or corporation in which he resides, or in which is the principal office of the corporation against or to which the process or notice is, if it be a city or town, on the president of the council, or board of trustees, or in his absence on the recorder or any aldermen or trustee."

The method of seizure in this case ought therefore to have been that prescribed by the state law as aforesaid—that is, the marshal ought to have served a copy of the warrant of the district attorney on the mayor of the city of Alexandria, or in his absence on the president of the council of said city, or in his absence on the recorder or any alderman of said city.

The marshal knew, or might easily have known, this method of seizure prescribed by the state law, and ought to have been informed of it if necessary by the district attorney.

Instead of pursuing that course, the marshal pursued the course named in his return, which is in these words: "I certify that I have seized the within described property, and given notice to R. Johnson, Esq., auditor of the corporation of Alexandria, as within directed."

In other words, instead of serving a copy of the warrant on the mayor, or in his absence on the next chief officer of the city, who might have been present as aforesaid, he gave notice of it (whether orally or in writing is not stated) to "R. Johnson, Esq., auditor of the corporation of Alexandria."

What are the duties of this auditor we know not. They may be important in regard to the debt of the corporation, and notice to him may in fact have been as apt to be communicated to the plaintiff as notice to the mayor. But it is enough to say that the law has made the mayor, &c., and not the auditor of the corporation, the agent thereof to receive such a notice, and service of notice upon him has no more effect in binding the corporation than service on any stranger would have had.

In *Miller v. United States*, 11 Wall. 268, the seizure was of stocks in railroad companies in Michigan, was made by giving notice of seizure to the president of one and vice-president of the other of said companies, and was held to be a good seizure, having been recognized to be good by the court in which the proceeding was had and the judgment of confiscation pronounced. But the law of Michigan prescribed no mode of seizure of the stock of a corporation, and the court had prescribed none in that case. The court therefore held that the mode of seizure pursued in that case was reasonable and sufficient. But even in that case the seizure was considered insufficient by the three dissenting judges.

The act of Congress in question is extremely penal in its effect, and ought therefore to be strictly construed, and a rigid compliance with all its requirements ought to be exacted. The means of defence which it afforded to those who were affected by it were exceedingly limited, and the mode of giving notice to them was necessarily very imperfect. It is all important, therefore, that they should have the full benefit of any defect in the *ex parte* proceedings had against them under that act. The objection goes to the want of jurisdiction in the court to pronounce the judgment complained of, and if the objection be a good one, it makes the judgment null and void, even in a collateral proceeding. While presumptions are made in favor of the judgment of a court of competent jurisdiction, they are not made in favor of jurisdiction when that is the question in controversy, and especially is that the case when the court whose jurisdiction is in controversy is one of limited jurisdiction, such as are the district and circuit courts of the United States. It cannot be presumed, therefore, in favor of the jurisdiction of the court in this case, that the marshal seized the property described in the warrant in the mode required by law, and especially can it not be so presumed in the face of his return, which shows that the only mode of seizure was by giving notice to R. Johnson, auditor of the corporation of Alexandria, which, as we have seen, was not a legal mode of seizure.

Then the *res* in this case was not brought by seizure within the power and control of the court which rendered the decree of confiscation in this case, which decree is therefore null and void, and the judgment of the court below must on that ground be reversed and annulled.

But the decree of the district court is void for another reason; and that is, the plaintiff in error was deprived by a rule of the said court of his legal and constitutional right to appear and defend himself in said court against the charge on which the proceeding to confiscate his property as aforesaid was founded. According to the agreed statement of facts in the case, "between March 14th and April 11th, 1864, an attorney at law appeared before John C. Underwood, judge of the district court of the United States for the District of Virginia, at Alexandria, as counsel, and endeavored to procure from him a reversal of the decree of confiscation entered in favor of the United States against Dr. Orlando Fairfax's (the plaintiff in this cause) house and lot, situated on Cameron Street in the city of Alexandria. The judge, the Hon. John C. Underwood, informed the attorney from the bench, that he could allow no appearance for any 'rebel' or 'traitor'; that this was the rule of his court as before that publicly announced, and that he had, in every case, ordered the appearance of counsel for, and the answer of, 'rebels' to be stricken from the files. The records of three confiscation cases tried in the United States district court for the District of Virginia before the said John C. Underwood as judge, between March 10th, 1864, and May 4th, 1864, in which the United States was plaintiff, and Dr. Orlando Fairfax (the plaintiff in this cause) was defendant, show that in each case the above rule and practice of the court, as proven by said attorney, that is, to allow no appearance for any 'rebel' or 'traitor,' was carried out against Dr. Orlando Fairfax, the defendant in those causes and the plaintiff in this, and that the appearance of his attorney, and his answers in those three causes, tried and determined between March 10th, 1864, and May 4th, 1864, were, by order of the United States district court at Alexandria, stricken from the files, on the ground that said Dr. Orlando Fairfax was within the Confederate lines, and a rebel."

The judgment for the confiscation of the stock or bonds held by Dr. Orlando Fairfax, and the money due to him thereon by the city of Alexandria, was rendered by the said district court on the 4th day of May, 1864, after the trial of the other three confiscation cases against the same defendant referred to in the said agreed statement of facts, in which cases his other estate, or most of it, was confiscated, and was in form a judgment by default, in the following words: "The papers in this cause having been heretofore returned, the usual proclamation having been made, the default of all persons being duly entered, and due deliberation being had on the pleadings, it is thereupon, on motion of L. H. Chandler, attorney for the United States, ordered, adjudged, sentenced, and decreed by the court, that the personal property mentioned and described in the libel in this cause be, and the same accordingly is, confiscated and condemned as forfeited to the United States." And then followed an award of a writ of *venditioni exponas* for a sale of the said property.

Whether the defendant, Fairfax, offered to appear and make his defence in said case, and was refused permission to do so, or refrained from

doing so vain a thing by the rule of the court, which had just been enforced against him in three other confiscation cases, does not appear. No doubt he would have so appeared and made his defence in the said case but for the said rule. If he had so appeared and made his defence, and afterwards, before the hearing of the case, the appearance and defence had been stricken from the files on the ground that he was a "rebel" or a "traitor," there can be no doubt but that the judgment afterwards rendered in the case as by default would have been reversed by the supreme court of the United States. It was so expressly and unanimously decided by that court in *McVeigh v. United States*, 11 Wall. U. S. R. 259, in which Mr. Justice Swayne, delivering the opinion of the court, said: "In our judgment the district court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are unanimous in this conclusion, our opinion will be confined to that subject. The order in effect denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. If assailed there he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice." Accordingly the judgment of the district court in that case was reversed, and the cause remanded to the circuit court with directions to proceed in it in conformity to law.

In *Underwood v. McVeigh*, 23 Gratt. 409, it was unanimously held by this court, that even in a collateral proceeding between other parties the judgment of the district court referred to in *McVeigh v. United States*, *supra*, having been rendered in the absence of McVeigh, was a nullity, and the deed of the marshal passed no title to the purchaser. Judge Christian, in delivering the opinion of the court, said: "The sentence of condemnation and sale was a nullity — void *in toto*. It was rendered absolutely void by the act of the court in refusing to permit McVeigh to appear and be heard. The authorities on this point are overwhelming, and the decisions of all the tribunals of every country, where an enlightened jurisprudence prevails, are all one way. It lies at the very foundation of justice, that every person who is to be affected by an adjudication should have an opportunity of being heard in defence, both in repelling the allegations of fact and upon the matters of law; and no sentence of any court is entitled to the least respect in any other court, or elsewhere, when it has been pronounced *ex parte* and without opportunity of defence." A tribunal which decides without hearing the defendant, or giving him an opportunity to be heard, cannot claim for its decrees the weight of a judicial sentence. See Smith's Leading Cases, vol. 1, part 2, ed. 1872, pp. 1118, 1119, and 1120, and the numerous cases there cited."

Such is the settled law where the defendant's appearance and answer are stricken from the files, and the court then goes on to decide the case in the absence of the defendant, and without being willing to hear him. In that case the judgment is not only void, but may be reversed on error by an appellate court.

But what difference can it make that the defendant's appearance and answer were first received and then stricken from the files if he was not

permitted to appear? It may make this difference to be sure: that, in the latter case, the refusal of the court to permit him to appear, not being matter of record in the case, he can obtain no relief by writ of error to an appellate court. But that difference strengthens the reason for giving him relief in a collateral proceeding, which is his only remedy. Surely he is entitled to some remedy for the grievous wrong which is done him by not permitting him to appear and defend himself against a criminal charge which is made against him. It is not his fault that he has no remedy by writ of error. He had no power to appear against the rule of the court to the contrary. He could not therefore make the refusal of the court a matter of record in the case. The judgment is therefore absolutely null and void, and must be so regarded in a collateral proceeding. The defendant is in effect not a party to the proceeding, and a judgment cannot be conclusive against a person not a party.

The defendant's right to appear and defend himself against the criminal charge made against him in the libel is manifest from the nature of the act of Congress, and all the proceedings against him in the confiscation case. The act was not made for the confiscation of property, merely because it was enemy's property, but because the owner of it had been guilty of certain criminal acts defined in the law. His guilt of these criminal acts is the foundation of the judgment of confiscation against him, and his right to defend himself against the charge of these acts is just as clear as would be his right to defend himself against a charge of murder or any other crime. Almost every step in the proceedings recognizes the right of the defendant to appear and make his defence. In the conclusion of the libel, prayer is made that process of monition may issue against the owner of the property therein described, and against all persons interested, or claiming an interest therein, warning them, at some early day to be therein named, to appear and answer this libel of information; and the owner of said property being absent and non-resident, prayer is further made for order of publication in the usual form, &c. And to the same effect are the subsequent proceedings in the case. As for instance, the order of court awarding the monition, appointing a time and place for the trial of the cause, and directing notice of such time and place, and of the substance of the libel to be given by publication thereof in a newspaper published in the city of Alexandria, and also by posting up the same at the court-house door; and that proclamation of the pendency of the suit be made by the marshal at the court-house door twice weekly until the day of trial. All of these directions appear by the record to have been complied with.

What a mockery, in the face of all these proceedings designed to notify the defendant of the charges made against him and to afford him an opportunity of appearing and making his defence, was the application to his case of the rule of the court to "allow no appearance for any 'rebel' or 'traitor!'" thus assuming his guilt of the crime charged against him, which charge he was summoned to answer.

That he was prevented by this rule thus announced from appearing and making his defence, is manifest. He had appeared and made his defence in several other confiscation cases against him tried just before the trial of this one, and his appearance and defence in those cases had

been stricken from the file, under the operation of the rule which was then announced to his attorney. He had precisely the same reason for appearing and making his defence in this case as in those cases; and he would, no doubt, certainly have done so, but for the rule which barred the court against him. It was certainly not necessary for him to do so vain a thing as to knock at the door of the court after it was barred, and when he knew it would not be opened to him. It can hardly be necessary to cite authority in support of views which seem to be self-evident. The cases of *Dean v. Nelson*, 10 Wall. 158; *Lasere v. Rochereau*, 17 Ib. 437; and *Tacey v. Irwin*, 18 Ib. 549, strongly sustain them; but it is unnecessary to do more than refer to them.

Upon the whole, the court is of opinion that the judgment of the circuit court is erroneous, and ought to be reversed and annulled; that the law, upon the facts stated in the case agreed, is for the plaintiff, and that judgment ought to be rendered accordingly.

Since writing the foregoing opinion, we have received and read the opinion of the supreme court of the United States in the case of *Windsor v. McVeigh*, recently decided in that court and not yet reported. We entirely concur in that opinion, and think the principles established by it fully sustain the views expressed by us in the latter branch of the foregoing opinion. That decision entirely accords with the decision of this court in *Underwood v. McVeigh*, 23 Gratt. 409,—the facts of the two cases being precisely alike. We have endeavored to show in the foregoing opinion, that there is at least as much reason in this case as there was in that for considering the judgment of confiscation void, on the ground that it was “a sentence of a court pronounced against a party, without hearing him or giving him an opportunity to be heard.” Such a sentence “is not a judicial determination of his rights, and is not entitled to respect in any other tribunal;” according to the opinion of the supreme court in the case above cited. We deem it unnecessary to say anything further than to express our gratification, that the principle which seems to us to be so just has thus received the emphatic sanction of that high tribunal.

The case was argued at the last term of the court, and before the election of Judge Burks; but he concurs in the opinion.

Judgment reversed.

CRIMINAL COURT OF THE COUNTY OF KENTON, KENTUCKY.

[AUGUST, 1877.]

EXTRADITION. — WHERE THERE IS NO PROVISION BY TREATY THERE CAN BE NO EXTRADITION.

STATE v. HAWES.

In the absence of positive stipulation by treaty there can be no extradition. A man cannot be extradited for one crime and tried for another and different crime.

JACKSON, J.¹ It appears that the prisoner, Smith N. Hawes, was indicted in this court for the following offences: Indictment No. 2,437, for embezzlement; No. 2,438, for same offence; No. 2,439, for same offence; Nos. 2,492, 2,493, 2,494, and 2,495, for the offences of forgery, respectively; and indictments Nos. 2,545, 2,546, 2,547, and 2,548, for uttering forged writing with intent, &c.

The first three cases were presented by the grand jury of this court on the 10th of February, 1876; and cases 2,492, 2,493, 2,494, and 2,495 were presented by the grand jury on the 31st day of August, 1876; and indictments Nos. 2,545, 2,546, 2,547, and 2,548, for uttering forged writing with intent, &c., were found on the 14th day of February, 1877, by the grand jury of this court.

The said Smith N. Hawes was, on or about the 23d day of February, 1877, and subsequent to the finding of all the indictments aforesaid, found to be residing in the Dominion of Canada, within the territory and jurisdiction of her majesty, the Queen of Great Britain, &c. He being so indicted as aforesaid, and being so found in Canada as aforesaid, was, in due form of law, according to the tenth article of the treaty concluded at Washington, on the 9th of August, 1842, between the United States of America and Great Britain, demanded for the four cases of forgery aforesaid, and not for the other cases for which he stood indicted as aforesaid; and by virtue of the article and treaty aforesaid, he was extradited and brought here to be tried in this court for the offences of forgery, included in the indictments Nos. 2,493, 2,494, and 2,495; but extradition was refused, although demanded for the offence of forgery included in indictment No. 2,492. It may as well be stated here that indictment 2,492, when called, was dismissed, on the motion of the attorney for the commonwealth, on grounds in writing filed, and with the consent of the court, and so, also, was indictment No. 2,494; and the grounds upon which said indictments were dismissed, while not relating to nor affecting the question under consideration, interpose an effectual bar to any trial thereon hereafter. In each of the cases Nos. 2,493 and 2,495, fair and impartial jury trials were had in this court, and verdicts of "not guilty" returned; therefore, as to the cases for which he was extradited and demanded, the prisoner stands acquitted and discharged by the judgments of this court. As to those, he cannot again be placed in jeopardy.

¹ Judge Jackson was specially appointed by the governor of Kentucky to try this important cause. — EDITOR.

It will be observed that, besides the cases for which said Smith N. Hawes, the prisoner at the bar, was extradited as aforesaid, there were then pending several other indictments in this court against him, for the offences of embezzlement, &c. These offences, of course, it is alleged, were committed prior to the extradition proceedings aforesaid. The first of these and which has been called for trial, is indictment No. 2,437.

And now the question is raised, by the motion under consideration, whether this court can now detain Hawes for trial of this or the other indictments pending against him, for offences charged to have been committed prior to his extradition, and for which he was not extradited.

The disposition of these motions settles the status of the prisoner as to the other cases referred to and which have not been disposed of.

The subject of the extradition of criminals has been much considered and discussed by the great public jurists of the world. There is a division of opinion among these upon the question how far a sovereign state is obliged to deliver up persons, whether its own subjects or citizens, or foreigners, charged with or convicted of crimes committed in another country, upon the demand of a foreign state. Some even go so far as to maintain that it is the law and usage of nations that every sovereign state is obliged to refuse an asylum to individuals accused of crime affecting the general peace and security of society, whose extradition is now demanded by the proper government. Others contend that the extradition of fugitives from justice is a matter of imperfect obligation only, and, though it may be practised by certain states as the result of mutual comity and convenience, requires to be confirmed and regulated by special contract in order to give it the force of an international law. The learned Mittermeyer considers the very fact of the existence of so many special treaties respecting this matter as conclusive evidence that there is no such general usage among nations, constituting a perfect obligation, and having the force of law properly so called. Even under systems of confederated states, this obligation is limited to the cases and conditions mentioned in the federal compacts. Lawrence's *Wheaton*, p. 232. As to political refugees, that great country, the language of whose people we speak, and from whence we derive our laws, has never permitted them to be embraced in extradition treaties, nor is their expulsion at the demand of their own governments within the policy of her alien acts. Lord Palmerston declared that "any such demand would be met with a firm and decided refusal. It is," he said, "obvious that it must be so, because no such measure could be taken by the government of this country without fresh powers by act of parliament; and no government could apply for such a power with any chance of success, inasmuch as no alien bill, I believe, either in former periods or in the course of this century, has been passed, ever giving to the government the power of expelling foreigners, except with reference to considerations connected with the internal safety of this country. The British government has never undertaken to provide for the internal security of other countries. It is sufficient for them to have the power to provide for the internal security of their own." *Hansard's Parliamentary Debates*, 3d series, vol. cxxiv. p. 805, March 1, 1853.

Contrary to the supposed rule in the time of Grotius, extradition does not now apply to political offences. Even Turkey, in 1849, refused the

demand made by Russia and Austria for the delivery up of the Poles and Hungarians who had escaped into the dominions of the sultan, and persisted in the refusal, although those two great countries suspended all diplomatic intercourse with the Porte. Ultimately the emperors of Russia and Austria receded from said demand. See Annual Register, 1849, p. 342. It was in reference to this demand of Russia and Austria on Turkey that Lord Palmerston, in a dispatch of October 6, 1849, to the British ministers at Vienna and St. Petersburg, grandly said: "If there is one rule more than another that has been observed in modern times by independent states, both great and small, of the civilized world, it is the rule not to deliver up political refugees. The laws of hospitality, the dictates of humanity, the general feeling of mankind, forbid such surrenders; and any independent government which, by its own free will, was to make any such surrender, would be universally and deservedly stigmatized as dishonored, unless," he adds, "a state is bound to extradition by the positive obligations of a treaty; but such treaty engagements are few, if, indeed, any such exist."

The United States have no treaty stipulations with any country for the delivery up of political offenders. For all such it is our proud boast that our country is a safe refuge, but not more so than England. The great principle recognized by British courts is that every man is free when he reaches British ground. As to other offences, such offenders only will be delivered up who are distinctly included in treaty stipulations. Such is the state of public opinion in both governments, that no administration would dare to omit in a treaty a stipulation to deliver up political offenders.

The preponderance of judicial authority in the American courts of justice, both state and federal, and the position of the United States government at an early period, and acted upon consistently to the present time, maintains the doctrine that, independent of special compact, no state is bound to deliver up fugitives from justice upon the demand of a foreign state. See Lawrence's Wheaton, p. 233; Mr. Jefferson's Letter to M. Genet, September 12, 1793; Chief Justice Tilghman, in *Respublica v. Deacon*, Sergeant & Rawle's Rep. vol. x. p. 125; Chief Justice Parker, in *Respublica v. Green*, Massachusetts Rep. vol. xvii. pp. 515-548, and the judgment of the supreme court of the United States in *Holmes v. Jennison*, Peters Rep. vol. xiv. p. 540.

For the opposite doctrine in this country I have been unable to find any authority except that of Mr. Chancellor Kent, in his Commentaries, vol. i. pp. 36, 37, and in his decision *In re Washburn*, Johnson's Ch. Rep. vol. iv. p. 166, but he is more than counterbalanced by the other authorities above cited, and by Mr. Cushing, than whom there does not live a more distinguished and able publicist. He says, that "It is the established rule of the United States, neither to grant nor to ask for extradition of criminals, as between us and any foreign governments, unless in cases in which stipulation is made by express convention." See Mr. Cushing's Opinions, August 19, 1853, and April 21, 1854. Opinions of Attorneys General, vol. vi. pp. 85-431.

The State of Kentucky, as an integral part of the United States, is bound to respect and observe any treaty with a foreign power made by

the general government. The second section of the sixth article of the Constitution of the United States is as follows: "The Constitution and laws of the United States, which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." Therefore, as a judge of the State of Kentucky, whenever upon any question it is ascertained what "the supreme law of the land" is, I am "bound thereby, anything in the Constitution or laws of" my "state to the contrary notwithstanding." Is there any "supreme law of the land" upon the question under consideration, and what is that law? By the Constitution and law of Kentucky, the prisoner (Smith N. Hawes) stands indicted for the offence of embezzlement, and he should be tried therefor and punished if found guilty, according to law, or acquitted if his guilt is not proven to the exclusion of a reasonable doubt, unless by the provision of the treaty of 1842, heretofore referred to, it is illegal to go into the investigation of the case at this time. If there be a treaty governing the subject, that treaty, as it now is, and not as it may be by subsequent conventions or high joint commissions between the high contracting parties, is now to control. I am bound to take judicial notice of the treaty concluded at Washington on the 9th of August, 1842, between the United States and Great Britain. By the tenth article of that treaty it was "agreed that the United States and her Britannic Majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found within the territories of the other; provided, that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had been there committed; and the respective judges or other magistrates of the two governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if on such hearing the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to proper executive authority that a warrant may issue for the surrender of such fugitives. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition and receives the fugitive."

This treaty is the "supreme law of the land," and I am bound to take judicial cognizance of that. If, by the terms of this treaty, either expressed or implied, the prisoner, Smith N. Hawes, cannot be tried for any offence for which he was not extradited, then, although he may be within the bar of this court, or in a jail under the control of this court, as this court is bound to regard that treaty, it is outside of its jurisdiction to

proceed with the trial, as the "supreme law of the land" otherwise provides, and this whole question hinges upon the construction of the treaty.

I have heretofore stated that it is the American doctrine, and I may say it is the British doctrine, that there can be no extradition unless by positive treaty stipulation. That government would be deservedly subject to the anathema hurled by Lord Palmerston against any power that would give up any one when not compelled so to do by positive treaty stipulation.

I confess that I have no respect for a power like Spain, which delivered up Mr. William M. Tweed when there was no treaty compelling the same, even though he may be the greatest criminal in the world. To say the least, it was truckling subserviency.

By the terms of the article of the treaty now under consideration, it is only for certain offences that extradition will be permitted by either government. Embezzlement is not one of those offences.

There is now no government that will deliver up any one charged with a political offence, not even Turkey; and, independent of the question whether the embezzlement of the funds of a town, a component part of a state government, is or is not a political offence, about which there is some difference of opinion among nations, is it not the true doctrine when nations enumerate the crimes for which they will permit extradition, that they be confined to that enumeration? It is urged, in argument, that there is no positive stipulation against the trial of a non-extraditable offence. Why mention any offences, if a party can be tried for any and everything not mentioned?

When nations enumerate, do they not exclude everything not enumerated? It is said by great political writers that when a bill of rights enumerates rights, all rights not enumerated cease to be rights. Here we have, by this treaty, a mutual agreement that certain offenders, and none others, may be extradited, to be tried. A thief or an embezzler is not a subject of extradition. By positive treaty stipulations the United States and Great Britain are asylums for such offenders, and must so remain until there are positive treaty stipulations other than those now existing. If it should be said that neither government should be an asylum for any criminal, why is it that there are no treaty stipulations to that effect?

While it is true that the mutual extradition of fugitives from justice is an object alike interesting to all governments, yet if there be any one thing more settled than another, it is that there is to be no such extradition unless by positive treaty stipulations. Then, if there be no treaty stipulations in this case against Hawes for embezzlement, and he was extradited to be tried for three offences of forgery alone, and he had been so tried (for a positive dismissal is a trial), is he to be tried for that for which he was not extradited? It must be conceded that the government of Great Britain would not have surrendered him to be so tried. Even in reference to one of the indictments for forgery against the prisoner, an offence included in the treaty, Great Britain refused extradition for the reason that the *prima facie* case required by law was not made out.

When Great Britain refused extradition for that offence, with what propriety could the United States, or the State of Kentucky, a component

part of the United States, proceed to try him for that offence so refused? It is undoubtedly true that Kentucky has jurisdiction over all offences committed within her territory, unless there be a treaty stipulation to the contrary, or a law of Congress passed within the purview of the Constitution. A treaty is the "supreme law of the land," and I, a judge of the state court, am bound to enforce it, as has heretofore been stated.

In this case there was no provision made by treaty for any of the offences of embezzlement, for which Smith N. Hawes stands indicted in this court. It is true that the offences of uttering forged instruments, with intent, &c., are included in the treaty; but when the demand was made for the delivery of Hawes, it was on the ground of neither embezzlement nor the utterance of forged paper, but for the offences of forgery alone, in four cases, and upon one of which the government of Great Britain refused to extradite him. And yet, all the offences enumerated herein were then pending against Hawes in this court. This government, however, did not demand his extradition for offences other than those included in the treaty. She had too much respect for herself to demand anything that was not right; and Great Britain is a country in which no demand other than right would be regarded. By the tenth article of the treaty now under consideration, it was solemnly agreed between the high contracting parties that upon mutual requisition (and that means either country demanding the surrender of a criminal) that he should be delivered up to justice upon the particular specific charges of murder, assault with intent to commit murder, piracy, arson, robbery, forgery, or the utterance of forged paper, any person who has sought an asylum, found upon the territory of either of the high contracting powers.

But this distinct proviso was made, "that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime and offence had been there committed;" and then there is a provision as to what the magistrates or authorities shall do under circumstances as may be proven in accordance with said section, as has been heretofore quoted.

Now if there be anything agreed between the two high contracting parties, it was that for the offences therein enumerated, and for no other, there was to be a mutual surrender; or, in other words, extradition, for the cases therein provided and stated, and for no other, whenever there was a case made therein by the proof under the treaty. For nothing else could such a demand or surrender be made. And when so made it is monstrous that there should be a trial for anything else.

If there be anything in the doctrine, that when you enumerate rights or privileges you are held to strictness as to the rights enumerated, and that everything else not enumerated is not included, then it follows as a logical sequence that the treaty here, having provided only for the extradition as to certain cases and under certain circumstances and proof, the right of asylum is to be held sacred as to anything for which the party was not or could not be extradited; and that this is the true doctrine, I cite that great man, Patrick Henry, in his great debate in the Virginia Convention to ratify the Constitution of the United States, and the subsequent writings of Jefferson and Madison on the same subject.

I am aware that in the case of *Richard B. Caldwell et al.*, decided January 3, 1871, in the Southern District of New York, by Judge Benedict, it was held that no matter how wrongfully or fraudulently the United States government obtained possession of a party, although expressly against the provisions of a solemn treaty with another government, he could be tried for any offence, although not extradited for the same; and the remarkable doctrine was uttered, that whether there was extradition in good faith or not, because the prisoner was at the bar of the court and in the custody thereof, he could be tried for anything, even a non-extraditable offence.

With me, when there is a solemn treaty staring me in the face, which would preclude a trial, although the party might be in the custody of the court, I would not disgrace my government or my country by the assumption of jurisdiction, when by such assumption the plighted faith of my government would be violated. I hold that the section of the treaty now under consideration does not authorize this government or England to demand extradition except for the offences included in the treaty, and then only for the offences proven in accordance therewith.

And inasmuch as I have heretofore said that my view of international law is that there is and can be no extradition except for offences especially provided by treaty, and no trial except for the offences thus extradited, so far as Smith N. Hawes is concerned, he has had a trial and disposition of the cases for which he was extradited; and now that it is proposed that he shall be tried for offences for which he was not extradited, I say, under the sanction of my oath, that I cannot try him now. I cannot dismiss the cases now pending against him; but I can say, by my order, that, in the face of a treaty which is the supreme law of the land, I will not now try Smith N. Hawes; nor will I detain him in custody, he being a subject of extradition, as has been heretofore stated; but when I say this I do not mean to say that he cannot hereafter be tried for the offences for which he stands indicted in this court. I hold that he is entitled to a reasonable time to return to the asylum from which he was wrested. What is that reasonable time? Were I called to define it, I should say six months; because a man should be permitted to make necessary family arrangements, and it may not reasonably be expected that he can do so in less time than as aforesaid.

The United States government not being here to claim the custody of Mr. Hawes, and there being no power in this court to compel the United States to return him to the place from which he was extradited, the order of this court is, that the cases of the Commonwealth of Kentucky against Smith N. Hawes, for embezzlement, and for uttering forged instruments of writing, with intent, &c., be continued, and be not again placed upon the docket for trial; and that said Hawes be not held in custody, until the further order of this court. In the consideration of this question—for it is the gravest question ever presented to my court—I have been greatly indebted to the able arguments of the counsel for the commonwealth and for the defendant, and in the opinion and the decision now rendered I have but one regret, that I have not had time to express myself properly on the grave questions involved.

The logical deductions in this, the gravest question ever presented to

any court, — and when I say that, I mean that I have been unable to find any precedent bearing upon the particular question under consideration, — have embarrassed me, but I have felt it an obligation to maintain the integrity of my country in its plighted faith in a grave constitutional treaty. I have regarded this case as not the case of Smith N. Hawes, but a case involving the honor and integrity of my country. Some other judge than I must be selected to violate the plighted faith of a solemn treaty. I hold, under the solemn sanction of my oath, that I cannot violate that by now proceeding to the trial of Smith N. Hawes. I do not mean to say that he may not hereafter be tried; but what I mean to say is that, in the face of the treaty herein referred to, he is not to be tried until there is a reasonable time given him to return to the asylum from which he was taken. He may by his own act put himself within the jurisdiction of this court, and may hereafter be tried. Upon that I now express no opinion.

Of course, in the consideration of this question, I have read all the correspondence between high public functionaries of my own government and that of Great Britain, especially as to the cases of Lawrence and Winslow; and while it is not proper for me to reflect upon the conduct of my own government, I must be permitted to say that the position taken by Great Britain on this treaty is more in consonance with human liberty and international law than the pretensions of my own government.

Mr. Webster (and it will not be denied that he was a great statesman and publicist), in reference to the leading case of McLeod, used the remarkable language, that the opinion and decision of the court in that case was not respectable. It was not permitted him to express any opinion as to the decision of Judge Benedict. In the Lawrence case, whatever may have been the diplomatic talk or judicial expressions, this great country instructed the law officers thereof not to proceed to the trial of a non-extraditable offence; and even in the case at bar, the United States has had a distinguished representative asking for a postponement or evasion of the decision whether Smith N. Hawes can be tried for offences for which he was not extradited.

I have not felt myself at liberty to evade any responsibility arising in this case. I believe it was Stephen Decatur who said: "My country, may she be always right; but my country right or wrong." That was not a judicial expression. My country should always be right. And, as a judge, I dare not enunciate any principle not right.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

(To appear in 121 Mass.)

HUSBAND AND WIFE. — TORT OF WIFE. — EVIDENCE OF ACTS OF HUSBAND IN WIFE'S PRESENCE.

HANDY v. FOLEY.

A husband and wife are jointly liable for a tort done by her in his absence, but under his direction and instigation.

Evidence of acts done by a husband in the presence of his wife, similar to those done by her in his absence, in execution of the same purpose, is admissible to show that the wife acted under his direction and instigation.

TORT. The declaration alleged that the defendants did forcibly enter the plaintiff's close, and wrongfully and forcibly remove, take, and carry away, and remove, cut, break up, and destroy the plaintiff's gate, to the injury and damage of the said plaintiff as laid in his writ; and "that the acts set forth and relied upon were committed by the said Ellen Foley alone, not in the presence of said Dennis Foley, but under his direction, and as his servant and agent, and as his acts as well as her own."

At the trial in the superior court, before Allen, J., the defendants contended that an action could not be maintained against the husband and wife under this declaration; but the judge ruled that the action might be maintained against both.

It appeared in evidence that the trespasses alleged were in the line of a way claimed by the husband, extending from a public highway, over the land of the plaintiff, which lay along the line of the highway, to the husband's land, lying at the rear of the plaintiff's land, where was situated the defendant's dwelling-house; and, for the purposes of the trial, it was admitted that the husband had a right of way through gates and bars from his land through the plaintiff's land in the line of the gateway to the public highway. The plaintiff offered evidence tending to show that the wife, in the absence of the husband, but, acting as the plaintiff contended, by the husband's direction and instigation, removed the gate from its hinges and threw it upon the ground at divers times, and at one time with an axe cut up and destroyed one half of the gate.

The plaintiff, for the purpose of showing that the husband encouraged and incited the wife to her acts, offered evidence of the acts of the husband, done in the presence of the wife, in removing the gate from its hinges and throwing it upon the ground. To this the defendants objected, but the judge admitted the evidence.

The judge ruled that for the acts of the wife done by herself alone, and without the knowledge and instigation of the husband, the plaintiff could not recover in this action against both defendants; but for the acts of the wife done in the absence of the husband, with his direction or instigation, the plaintiff could recover.

The jury returned a verdict for the plaintiff; and the defendants alleged exceptions.

C. A. Reed, for the defendants.

J. Brown, for the plaintiff.

GRAY, C. J. The instructions were correct. A husband and wife may be jointly sued and charged for a tort done by both of them, if she does not act by his coercion. *Hyde v. S—*, 12 Mod. 246; *S. C. Holt*, 101; *Vine v. Saunders*, 5 Scott, 359; *S. C. 4 Bing. N. C.* 96; *Marshall v. Oakes*, 51 Maine, 308. In *Tobey v. Smith*, 15 Gray, 535, a declaration in tort in the nature of trover against husband and wife was held bad, merely because it alleged the conversion to have been "to their own use," whereas in legal contemplation it could not be to the use of the wife; and it was distinctly stated in the opinion, that, if the conversion had been alleged to have been to his use, the action could have been maintained. And in *Heckle v. Lurvey*, 101 Mass. 344, it was held that a wife was liable in tort for the conversion of goods of which she obtained possession by her husband's order. Even in criminal cases, the husband's mere direction and instigation will not protect the wife from liability for acts done in his absence and beyond his immediate influence and control; and the presumption of coercion, which exists when she acts in his presence, is *prima facie* only and may be rebutted. *Commonwealth v. Butler*, 1 Allen, 4; *Commonwealth v. Feeney*, 13 Allen, 560; *Commonwealth v. Munsey*, 112 Mass. 287; *Commonwealth v. Lewis*, 1 Met. 151, 153; *State v. Cleaves*, 59 Maine, 298. The statement in 2 Kent Com. 149, that, if the wife commits a tort "in his company or by his order," he alone is liable, is too general, and must be limited to the case of her acting by his coercion.

The evidence of acts done by the husband in the presence of the wife, similar to those done by her in his absence, in execution of the same purpose, was competent to show that the latter were done by his direction and instigation, and therefore in law his acts as well as hers.

Exceptions overruled.

AGREEMENT TO ARBITRATE.—OUSTING JURISDICTION.—EQUITY
PLEADING.

PEARL v. HARRIS.

An agreement to submit to arbitration, the effect of which is to oust the courts of jurisdiction, is invalid.

A bill in equity for an account of a copartnership, one of the articles of which provided for the submission of disputed matters to arbitration, need not allege a refusal to refer by the defendants; and the defendants cannot defeat the jurisdiction of the court by alleging that they are and have been willing to refer under the articles of copartnership.

MORTON, J. The defendants' appeal from the order of the court appointing a master can only be sustained upon the ground that the agreement in the articles of copartnership, to refer all disputed matters to arbitrators, ousts this court of jurisdiction. But it is well settled that an agreement to submit to arbitration will not be held valid, either in law or equity,

when its effect is to oust the court of jurisdiction. *Wood v. Humphrey*, 114 Mass. 185; *Tobey v. County of Bristol*, 3 Story, 800.

The defendants insist that a court of equity ought not, in its discretion, to entertain the case, because the plaintiffs in their bill do not allege a refusal to refer on the part of the defendants, and the defendants in their answer deny any refusal, and allege that they are willing to refer. It was not necessary for the plaintiffs to allege that the defendants have refused to refer. By bringing their bill they have elected to resort to the jurisdiction of this court, and the defendants cannot defeat that jurisdiction by alleging that they are and have ever been willing to refer under the articles of copartnership. We need not decide whether the court might, in its discretion, decline to proceed in the case, if it appeared that the plaintiffs unreasonably refused to submit disputed matters to arbitration, because it does not appear in this case that there was such unreasonable refusal on the part of the plaintiffs.

Order affirmed.

COURT OF APPEALS OF VIRGINIA.

(To appear in 28 Grattan.)

INTEREST. — ABATEMENT OF DURING WAR. — OBLIGATION OF CONTRACTS.

ROBERTS' Adm'r v. COCKE.

MURPHY v. GASKINS, Adm'r.

Where, during the late war, a creditor resided within the territory of one of the belligerent powers, and his debtor within that of the other, such debtor is, under the rules of public law, entitled to abatement of interest during the continuance of the war.

Where the debtor and creditor reside within the same territory, the mere existence of war does not furnish such a legal ground for abatement of interest.

In contracts for the payment of a sum certain, interest on the principal sum is a legal incident of the debt: the right to it is founded upon the presumed intention of the parties.

Wherever there is a contract, express or implied, for the payment of legal interest, the obligation of the contract extends as well to the payment of interest as it does to the payment of the principal sum; and neither court nor jury ever had the power to dispense with the performance of such contracts in whole or in part.

The laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of the contract, whether such laws affect its validity, construction, discharge, or enforcement.

While it is competent for the state to alter or change the remedy on a contract, this can only be done where the change does not impair substantial rights.

The act of the general assembly, approved April 2, 1878, entitled "An act to amend and reenact § 14, ch. 187, of the Code of 1860, in relation to interest," so far as said act confers upon courts and juries, in the suits therein mentioned, power to remit interest, as therein provided, on contracts entered into prior to April 10, 1865, which said courts and juries did not have under the laws in force at the time such contracts were entered into, is repugnant to the Constitution of the United States, and of this state, and is so far null and void.

And so much of the said act as empowers the courts to review judgments and decrees, upon motion, and to abate interest as in said act provided, is repugnant to the Constitution of the United States, and of this state, and therefore void.

THE facts are stated in the opinion.

F. M. Forbes, for the appellants.

Huntton, Brooke & Scott, for the appellees.

BURKS, J., delivered the opinion of the court.

The amounts in controversy in these cases are small. Besides the costs, in the first case, only \$182, and in the second \$119.41, not sufficient of themselves to give this court jurisdiction to review the judgments of the court below. Our jurisdiction is invoked, however, upon the ground set out by the plaintiffs in error in their petitions, that the act of the general assembly, under which the judgments were rendered, is unconstitutional and void; and we have given to the question, thus presented for our determination, that consideration which its importance demands.

Throughout our deliberations, terminating in the conclusion to which we have come, we have been guided by the wise and salutary rule enunciated by Chief Justice Marshall as long ago as 1810, in the leading case of *Fletcher v. Peck*, 6 Cranch, 87, generally followed by the courts of last resort in the several states in like cases, and by none more uniformly and implicitly than by this court. *Griffin's Ex'or v. Cunningham*, 20 Gratt. 81; *Homestead Cases*, 22 Ib. 266.

The question, says the chief justice, whether a law be void for its repugnancy to the Constitution, is at all times a question of much delicacy, which ought seldom if ever to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such, that the judge feels a clear and strong conviction of their incompatibility with each other.

The act, the validity of which is drawn in question in these cases, was approved April 2, 1873, and is entitled "An act to amend and reënact section 14, of chapter 187, of the Code of 1860, in relation to interest." The section, as thus amended and reënacted, constitutes the 14th section of chapter 173 of the Code of 1873, p. 1120.

The amendment, in substance, empowers the courts and juries in all suits for the recovery of money founded on contracts, express or implied, or on causes of action, or on liabilities which were entered into or existed, or where the original consideration accrued prior to the 10th day of April, 1865, to remit the interest upon the original debts found to be due, or any part thereof, for the period between the 17th day of April, 1861, and the 10th day of April, 1865, or for any portion of said period. It further empowers the court, in which any judgment or decree has been rendered prior to the passage of the act, on motion of the defendant, upon ten days' notice to the plaintiff, to review such judgment or decree, and abate the same to the extent of the interest for the period aforesaid.

In the first of the cases now under review here, the plaintiff brought an action of debt in the court below upon a bond, which was in these words:—

"\$762.

"Nine months after date, for value rec'd, we, the undersigned, promise to pay to C. M. Roberts, or order, seven hundred and sixty-two dollars, with int. from date.

"Witness our hands and seals this 12th day of Decem'r, 1860.

(Security.)

"WILLIAM COCKE, [Seal.]

"RICH'D H. CARTER, [Seal.]"

The defendants appeared and filed three pleas: 1st, payment; 2d, a plea averring that the bond sued on was entered into prior to the 10th day of April, 1865, and praying judgment that the interest on the bond from the 17th day of April, 1861, till the 10th of April, 1865, be remitted in accordance with the act aforesaid; and 3d, a plea of the like tenor and with the like prayer as the 2d, with the further averment that "the confusion of the business relations of the country incident upon the secession of the State of Virginia from the United States, and the war consequent thereupon between the Confederate States and the United States, was so great and disorganizing that the principal money in said writing obligatory specified was not worth any interest between the periods aforesaid to the defendants, who were citizens of the county of Fauquier, which was occupied from time to time by the federal troops."

The plaintiff took issue on the plea of payment and demurred severally to the other pleas.

The demurrers were overruled, and, neither party demanding a jury, the whole matter of law and fact was submitted to the court; and the bond sued on being given in evidence, and that being all the evidence, the court gave judgment for the plaintiff for the principal sum specified in the bond, with interest from the time it became payable until the 17th day of April, 1861, and from the 10th day of April, 1865, until payment, and for costs, expressly remitting the interest between the dates aforesaid.

In the second case the plaintiff, Frances A. Murphy, in the year 1869, brought an action of covenant in the circuit court of Fauquier County, upon an instrument under seal and of the tenor following:—

"Received, Nov'r 26th, 1860, of Frances A. Murphy, five hundred dollars, to bear interest from date. I also agree to and put a negro boy, Abraham, in pond [meaning in pawn] to secure the payment of the same.

Whenever the five hundred dollars is paid to Mrs. Murphy, with legal interest, the said boy no longer belongs to the said Mrs. Murphy, but the title returns back to me.

"Given under my hand and seal this the 26th day of November, 1860.

"JOHN GASKINS, [Seal.]"

The defendant pleaded to this action "covenants performed" and "covenants not broken;" upon which pleas issues were made up, and neither party demanding a jury, the issues were tried by the court on the 4th day of April, 1872, and judgment was rendered for the plaintiff for the \$500 in the covenant specified, with interest from the date thereof, and for costs.

On the 12th day of April, 1878, the personal representative of John

Gaskins (the defendant in error here), pursuant to notice, made a motion in the circuit court of Fauquier County for a review of the judgment aforesaid, and an abatement of the interest included therein between the 19th day of April, 1861, and the 10th day of April, 1865; and the court rendered judgment accordingly, abating said interest. Upon the hearing of the motion the only evidence adduced was the record of the first judgment, including the covenant on which it was rendered.

We will examine the case of *Roberts' Adm'r v. Cocke* first, and when we have disposed of that, we shall have but little to say of the other case.

If, during the late war between the United States and the Confederate States, the defendants Cocke and Carter had resided within the territory under the dominion of one of the belligerent powers, and their creditor had resided in the territory of the other of said powers, they would have been entitled, independently of the statute in question, to an abatement of the interest during the time the war lasted. Such is the rule of the public law applicable to a war between independent nations, and at an early period after the termination of the late war between the states, it was applied by the courts to that war. It was so applied in 1866 by the district court of appeals of Virginia for the first judicial district. See the opinion of the court delivered by Judge Joynes in *Tucker v. Watson, McGill & Co.* 6 Am. Law Register (N. S.), 220; citing among other authorities *McCall v. Turner*, 1 Call, 133, and *Brewer v. Hastie & Co.* 3 Call, 22; and this court recognized the same rule in the case of *McVeigh v. The Bank of the Old Dominion*, 26 Gratt. 188.

The supreme court of the United States, although at first hesitating as to this application of the rule (*Ward v. Smith*, 7 Wall. 447), finally sanctioned it by their decision in *Brown v. Hiatt*, 15 Wall. 177.

If, therefore, Cocke and Carter (the defendants in error) had been alien enemies in respect of their creditor, they would have been entitled to an abatement of the interest on their debt for the period covered by the war, and might have made their defence, certainly under a special plea, and perhaps under the plea of payment, as was allowed to be done in *McCall v. Turner*, *supra*.

But as no such defence was made, it is to be presumed, if indeed it may not be inferred from the record, that the facts did not warrant the defence.

The averment which seems to be the gist of the third plea, that the principal money "was not worth any interest to the defendants" during the war, was no bar to the plaintiffs' right to recover. The defendants by their bond had expressly stipulated for continuing interest on the debt without any exception of the period during time of war, should one occur, and the law, as the general rule, makes no such exception where the contracting parties make none. It may be true that the defendants derived no benefit from the use of the principal money during the war. This may have been their fault or their misfortune; but whether the one or the other, the contract was not affected by it. They were at liberty under the contract to discharge the obligation at any time by payment, according to its terms, of the principal sum and accrued interest. They neither paid nor offered to pay any part of either, and while they with-

held another's money it does not lie in their mouths to say that they derived no benefit from it, and therefore should not be required to pay for the use of it that compensation which they had agreed to pay.

It remains to consider whether the third plea, stripped of the faulty matter which has been passed upon, and the second plea entitled the defendants to the abatement of the interest which they claimed, and which by the judgment of the court was allowed and ordered. The solution of this question depends upon the answer to be given to the main question in these cases: Is the act of the legislature, by force of which only the judgment was rendered, valid as law? Is the act repugnant to the Constitution of the state, or to the Constitution of the United States?

Section 1, article 5, of the Constitution of this state, is in these words: "The legislative power of this commonwealth shall be vested in a general assembly, which shall consist of a senate and house of delegates." Whatever power therefore is comprehended in the terms, "the legislative power of this commonwealth," is vested in the general assembly by the section aforesaid, subject only to such limitations as are imposed by other parts of the state Constitution and by the Constitution of the United States. Amongst the limitations contained in the latter, section 10, article 1, declares that "no state shall pass any law impairing the obligation of contracts;" and the same inhibition is put upon the general assembly by the Constitution of the state, article 5, section 14.

Speaking of this clause, Judge Cooley says: "No clause which the Constitution contains has been more prolific of litigation, or given rise to more animated and at times angry controversy. It is but twice alluded to in the papers of the Federalist, and though its great importance is assumed, it is evident that the writer had no conception of the prominence it was afterwards to hold in constitutional discussions, or of the very numerous cases to which it was to be applied in practice." Cooley's Con. Lim. 273. And Chief Justice Marshall in 1827, in the case of *Ogden v. Saunders*, 12 Wheat. 213, 335, responding to the question, what is a law impairing the obligation of contracts, said, that "in solving this question all the acumen which controversy can give to the human mind has been employed in scanning the whole sentence and every word in it."

The numerous and diversified cases which have arisen under this clause of the Constitution from time to time since its adoption have been the occasion of a great multitude of decisions by the supreme court of the United States and the supreme appellate tribunals of the several states.

In the light of these decisions, let us first see what has been the result of judicial inquiry as to the true meaning of the clause, "any law impairing the obligation of contracts," and we can then determine whether the act of the legislature in question is such a law.

The clearest and most satisfactory construction of this clause is given by Chief Justice Marshall, in 1819, in the opinion pronounced by him in *Sturges v. Crowninshield*, 4 Wheat. 122, 197.

"It would seem difficult," said he, "to substitute words which are more intelligible or less liable to misconstruction than those which are to be explained. A contract is an agreement in which a party undertakes to do or not to do a particular thing. *The law binds him to perform his undertaking; and this is, of course, the obligation of his contract.* In the case

at bar, the defendant has given his promissory note to pay the plaintiff a sum of money on or before a certain day. The contract binds him to pay that sum on that day; and this is its obligation. Any law which releases a part of this obligation must, in the literal sense of the word, impair it; much more must a law impair it which makes it totally invalid and entirely discharges it."

This construction of the clause of the Constitution and interpretation of its words have been followed by the courts ever since they were declared. As it is the *law binding* to the performance of the contract which constitutes the *obligation*, it has accordingly been held, and is now thoroughly settled, that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms; and this principle embraces alike those which affect its validity, construction, discharge, and enforcement: that the ideas of validity and remedy are inseparable, and both are parts of the obligation guaranteed by the Constitution against invasion; that while the remedy may be altered or changed by the state, yet it is with the qualification that the change shall not impair substantial rights: and that a law which lessens the duty under the contract on the one side, or abridges the right on the other, whether such law acts directly on the contract or indirectly through the remedy, impairs the obligation, and is void. *Bronson v. Kinzie*, 1 How. 311; *McCracken v. Hayward*, 2 Ib. 608; *Von Hoffman v. City of Quincy*, 4 Wall. 535; *White v. Hart*, 13 Ib. 646; *Gunn v. Barry*, 15 Ib. 610; *Walker v. Whitehead*, 16 Ib. 314; *The Homestead Cases*, 22 Gratt. 266; *Bank of Old Dominion v. McVeigh*, 20 Gratt. 547; *Taylor v. Stearns*, 18 Ib. 244.

The rule, then, being that the laws in force at the date of a contract enter into and form part of it, it is pertinent to inquire what the laws of Virginia were touching interest prior to the 10th day of April, 1865. For a reference to the early statutes on this subject see note to 1 Revised Code, 373. The subsequent statutes will be found in 1 Revised Code, ch. 102, ch. 128, §§ 79, 80; Code of 1860, ch. 141, §§ 4, 5 *et seq.*, ch. 171, § 44; Code of 1873, ch. 137, ch. 173, § 14, ch. 167, §§ 43, 44.

It has always been lawful in Virginia for parties to contract for the payment of interest for the use or forbearance of money within the limits prescribed by statute; and in the absence of any express agreement for the payment of interest, in obligations for the payment of a certain sum of money on demand or on a given day, interest on the principal sum from the time it becomes payable is "a legal incident of the debt, and the right to it is founded on the presumed intention of the parties." *Chapman's Adm'r v. Shepherd's Adm'r*, *fec.* 24 Gratt. 377.

Judge Staples, in delivering the opinion of the court in the case just cited, speaking of the defences which may be made to the recovery of interest on such obligations as we have mentioned, says: "It is true that the debtor may sometimes, under peculiar circumstances, avoid the payment of interest; but these are matters of defence, the burden of which is upon him in all cases. They are offered to show that the obligation to pay the interest has been discharged, and not that it did not originally exist. If no valid ground of defence is shown, the judgment is as cer-

tainly rendered for the interest as for the principal. In contracts of the character just mentioned, it is apparent, therefore, that interest is not given as damages at the discretion of the court or jury, but as an incident of the debt, which the court has no discretion to refuse."

Wherever there is a contract, express or implied, for the payment of legal interest, the obligation of the contract extends as well to the payment of the interest as it does to the payment of the principal sum, and neither the courts nor the juries ever had the arbitrary power to dispense with the performance of such contract, either in whole or in part.

Such being the law binding upon parties to contracts, and upon the courts and juries prior to the 10th day of April, 1865, was it competent for the legislature to change the law, and by giving it a retrospective action to deprive a party to a contract of the benefit to which he was entitled under it? It will not be pretended that the legislature could by a statute, acting either directly upon the contract or indirectly through the remedy, release the principal sum or any part of it; and this because the law binds the debtor to the performance of his undertaking, which is the payment of such principal sum; and for the same reason it would seem equally clear that the interest, when a part of the contract, and its payment as much a part of the undertaking of the debtor as the payment of the principal, cannot by legislative action, direct or indirect, be remitted, released, or discharged.

If by the laws in force prior to the 10th day of April, 1865, when the contracts were entered into, upon which the Act of April, 1873, is intended to operate, the courts and juries had, as some seem to suppose, absolute control over the subject of interest, and were invested with full power in their discretion to allow or disallow interest in all cases coming before them, what necessity was there for the act of April 2, 1873? Why pass an amendatory act merely to confer upon them a power which they already had under the law without amendment?

It would be unjust to the general assembly to impute such a purpose to them.

We must conclude, therefore, that the object of passing the act was, and if the acts were valid, its effect would be, to confer upon the courts and juries a power over the subject of interest connected with past transactions not possessed by them under the law at the time such transactions took place,—the power to "*remit* the interest upon the original debt *found to be due*, or any part thereof," from the 17th day of April, 1861, to the 10th day of April, 1865. The power to "*remit*" is a power to release. It is conferred by the act without any limitation except the discretion of those upon whom it is conferred; a discretion not controlled by the settled principles and established rules of our jurisprudence, but to be exercised according to the pleasure of the courts and juries. In other words, it is an arbitrary power, the exercise of which can hardly be called a judicial inquiry.

The dates, 17th April, 1861, and 10th April, 1865, indicate the commencement and termination of the late war. The first was the day on which Virginia passed her ordinance of secession, and the last the day after that on which General Lee and the Confederate army surrendered at Appomattox Court House. It is to be inferred, therefore, that the re-

mission of interest was authorized by reason of the existence of the war. But the mere existence of war does not abrogate debts, nor does it ordinarily stop the running of interest on debts, except, as before stated, between alien enemies. To make the war, therefore, the occasion, under all circumstances, for the remission of interest on antecedent debts and contracts, would be giving it a controlling character as a fact in determining the rights of parties which it did not have under the law at the time such contracts were entered into, and would thus substantially impair the obligation of such contracts.

In the case of *McCall v. Turner*, 1 Call, 133, there are expressions in the opinions of several of the judges which might indicate that, under the law as it then stood, they thought that the juries were invested with discretion to abate interest in all cases during war. But these expressions are mere *dicta*, and have no controlling influence as authority. The case decided was a controversy between parties who were considered as occupying the relation to each other of alien enemies during the Revolutionary War, and the interest during the war was therefore properly abated.

Ambler's Ex'ors v. Macon, 4 Call, 605, decided in 1803, contains a *dictum* of Judge Pendleton, that "interest during the war ought not in justice and equity to have been allowed on debts due to domestic creditors no more than to foreign; but since it has not been attended to, either in practice or judicial decisions, until so much business has been otherwise adjusted, it would be unjust at this late era to introduce it in a particular case, unless in one attended with peculiar circumstances." Afterwards, in 1804, came on the case of *Hawkins' Ex'or v. Minor*, *et c.* 5 Call, 118, which was an appeal from a decree pronounced by Chancellor Wythe in the high court of chancery. One of the errors assigned on the appeal was, that the chancellor had disallowed interest for the period of the Revolutionary War in a case where both creditor and debtor resided, during the war, in Virginia; and this court unanimously held that the disallowance by the chancellor of interest for said period was erroneous.

In the case of *Crenshaw v. Siegfried*, 24 Gratt. 272, one of the questions decided by this court was, that it was error in the court below to deduct interest during the war on a bond given before the war for the payment of a sum of money with interest from date. As the decree by which this deduction was made was pronounced prior to the passage of the act of the legislature, the validity of which is drawn in question in the cases now before us, this court did not in that case pass upon the validity of said act. But Judge Moncure, in delivering the opinion of the court, said: "Certainly the use of money is a valuable and legal consideration for a promise to pay legal interest thereon; and even *an act of the legislature passed to annul or impair such a promise would be unconstitutional and void*. Of course a decree declaring such a promise to be void, even in the absence of such an act, must therefore be erroneous."

Our conclusion is, that the act of the general assembly, approved April 2, 1873, entitled "An act to amend and reenact section 14 of chapter 187 of the Code of 1860, in relation to interest," so far as said act confers upon courts and juries, in the suits therein mentioned, a power to remit interest, as therein provided, on contracts entered into prior to the 10th day of April, 1865, which said courts and juries did not have under

the laws in force at the time such contracts were entered into, is repugnant to the Constitution of the United States, and to the Constitution of this state, and is so far null and void. And we are further of opinion, that the mere existence of the late war between the United States and the Confederate States does not alone furnish any legal ground for the abatement of interest on debts upon contracts during the time such war lasted. We do not mean to say, however, that there may not be special cases, attended with circumstances connected with or growing out of the war, which would furnish legal cause for abatement of interest. When such cases arise, they must be decided according to the law applicable to the peculiar facts and circumstances of each case. We can only lay down the general rule.

It follows from what has been said, that, in our opinion, the judgment of the circuit court of Fauquier County, in *Roberts' Adm'r v. Cocke, &c.*, the first of the cases considered by us, based as it is solely on the act of the legislature aforesaid, is erroneous, and should be reversed and annulled.

Our reasoning in the first case leaves us but little to say in the second.

Blackstone, in his Commentaries, divides contracts of debt into three classes: debts of *record*, debts by *special* and debts by *simple* contract. "A debt of record is a sum of money which appears to be due by the evidence of a court of record. Thus when any specific sum is adjudged to be due from the defendant to the plaintiff in an action or suit at law, this is a *contract of the highest nature*, being established by the sentence of a court of judicature." 1 Chitty's Black. book 2, side p. 455.

With us decrees for money are of the same nature and dignity as judgments.

Judgments and decrees for money being contracts of the highest character, of course, and for the reasons before stated, to abate any portion of the interest included in them would necessarily impair their obligation. Moreover, by such judgments and decrees the rights of the parties, in whose behalf they were rendered, to the money ordered to be paid, whether principal or interest, have become *vested*, and cannot be *divested*, as provided by the act of the general assembly. *Griffin's Ex'or v. Cunningham*, 20 Gratt. 31.

We therefore conclude, that so much of the act aforesaid as empowers the courts to review judgments and decrees upon motion, and abate interest, as in said act provided, is repugnant to the Constitution of the United States and to the Constitution of this state, and is therefore void; and it follows that the judgment of the circuit court of Fauquier County in the second case, *Murphy v. Gaskins' Adm'r*, based upon said act, is erroneous, and must be reversed and annulled.

Judgments reversed.

Not sitting: Anderson and Staples, JJ.

COURT OF APPEALS OF MARYLAND.

(To appear in 45 Md.)

DEED OF TRUST DISTINGUISHED FROM MORTGAGE. — PRESUMPTION OF GOOD FAITH AND DILIGENCE ON THE PART OF A TRUSTEE SETTING ASIDE TRUSTEE'S SALE. — INADEQUACY OF PRICE.

BANK OF COMMERCE v. LANAHAN.

A deed dated the 17th of November, 1874, from Edwin Walters and wife to Thomas M. Lanahan, trustee, contained the following recital: "Whereas, the said Edwin Walters stands justly indebted unto sundry persons in various sums and amounts of money which he is at this time unable to pay; and whereas, he has asked an extension of his creditors of their several claims of nine, twelve, fifteen, and eighteen months, with interest from the day of the execution of these presents; and whereas, said request has been granted to said Walters upon the condition that he shall execute these presents for the purpose of securing the payment of their respective claims in the manner, upon the conditions and with the priorities hereinafter provided, as the same shall fall due and mature. Now, for the purpose of securing the payment of his said creditors their respective claims, as above set forth, these presents are executed." The deed then continued: "Now, in consideration of the premises, together with the sum of five dollars, &c.," "the said Edwin Walters and Virginia Caroline Walters, his wife, do hereby bargain and sell, assign, transfer, and make over and convey to the said Thomas M. Lanahan, his heirs, executors, administrators, and assigns, all and singular their right, title, interest, and estate, both at law and in equity, jointly and severally, in and to all and singular, those several pieces or parcels of land and improvements, situated," &c. [Here followed a description of the property intended to be conveyed.] "To have and to hold, &c., unto the said Thomas M. Lanahan, his heirs and assigns forever. In trust and confidence, nevertheless, and for the purposes following, that is to say: That if the said Edwin Walters shall pay each and all of his said creditors, having claims against him on the day of the date of these presents, the amounts due and owing to them, with interest, as the same shall fall due and mature, as above set forth and provided for, in nine, twelve, fifteen, and eighteen months, then this deed of trust shall be void, and the said Thomas M. Lanahan, trustee as aforesaid, shall reconvey the above described property to the said Edwin Walters, his heirs or assigns." It was further provided that in case of default in the payment of any one or more of the said creditors, any instalment or portion of their claim as the same should mature, it should be lawful for the said Lanahan to take possession of the said property, and to sell the same in his discretion at public or private sale, and for the most money that could be realized therefor, &c. The proceeds of such sale to be applied: 1st. To the payment of all expenses, including commissions to the trustee. 2d. To the payment of a judgment in favor of said Lanahan of \$30,000, with interest. 3d. The balance to be applied to the payment of the other creditors of said Walters, who were such on the day the deed was executed, and if anything remained, the same to be paid to the said Walters or his assigns. It was covenanted in the deed that until default the grantor should retain the possession and use of the property. The instrument was duly acknowledged, and the grantee made affidavit that the consideration was true and *bona fide* as therein set forth. *Held*:

- 1st. That the foregoing deed was not a technical mortgage within the contemplation of section 5 of article 64 of the Code, but a deed of trust, clearly denominated such by section 55 of article 24 of the Code.
 - 2d. That being a deed of trust, and not a mortgage within the meaning of section 5 of article 64 of the Code, it was not necessary to the validity of a sale under the deed that it should be made in the county where the property was situated, and advertised in a newspaper printed in said county.
- Bad faith or negligence on the part of a trustee in the sale of trust property will not be presumed, but, on the contrary, the presumption is that he has discharged his duty

faithfully, and that presumption prevails until it is made to appear otherwise by those seeking to impeach the sale.

The fact that a sale of trust property took place on the day of the general state election does not, of itself, constitute a sufficient ground for setting it aside.

Inadequacy of price alone is not sufficient to vacate a sale, unless it be so gross and inordinate as to indicate some mistake or unfairness in the sale, for which the purchaser is responsible, or misconduct or fraud on the part of the trustee.

APPEAL from the circuit court for Baltimore County, in equity.

The appeal in this case was taken from an order of the court below, passed on the 3d of January, 1876, finally ratifying a sale of certain real estate, situated in Baltimore County, made by Thomas M. Lanahan, trustee, by virtue of the following deed:—

This indenture, made this 17th day of November, 1874, between Edwin Walters and Virginia Caroline Walters, his wife, of the city of Baltimore and State of Maryland, of the one part, and Thomas M. Lanahan of the same place, trustee, as hereinafter stated, of the other part, witnesseth: whereas the said Edwin Walters stands justly indebted unto sundry persons in various sums and amounts of money which he is at this time unable to pay; and whereas, he has asked an extension of his creditors of their several claims of nine, twelve, fifteen, and eighteen months, with interest from the day of the date of the execution of these presents; and whereas, said request has been granted to said Walters, upon the condition that he shall execute these presents for the purpose of securing the payment of their respective claims, in the manner, upon the conditions, and with the priorities hereinafter provided, as the same shall fall due and mature.

Now for the purpose of securing the payment of his said creditors their respective claims as above set forth, these presents are executed.

Now in consideration of the premises, together with the sum of five dollars in hand paid by the party of the second part to the parties of the first part, the receipt whereof is hereby acknowledged, the said Edwin Walters and Virginia Caroline Walters, his wife, do hereby bargain and sell, assign, transfer, make over, and convey to the said Thomas M. Lanahan, his heirs, executors, administrators, and assigns, all and singular, their right, title, interest, and estate, both at law and in equity, jointly and severally, in and to all and singular those several pieces or parcels of land and improvements, situated in Baltimore County, in the State of Maryland, and likewise in the parishes of St. Martin and St. Mary, in the State of Louisiana, and severally described as follows: [Here followed a description of the property.]

Together with all the buildings and improvements situated upon each and all of the above described tracts of land situated in Maryland and Louisiana, and all the rights, privileges, and appurtenances thereunto belonging, and together with all and singular the personal property of every kind and description now upon the premises above described, in the states of Maryland and Louisiana.

To have and to hold all of the above described property, real and personal, situated as aforesaid, in the states of Maryland and Louisiana, unto the said Thomas M. Lanahan, his heirs and assigns forever. In trust and confidence nevertheless, and for the purposes following, that is to

say: That if the said Edwin Walters shall pay each and all of his said creditors, having claims against him, on the day of the date of these presents, the amounts due and owing to them, with interest, as the same shall fall due and mature, as above set forth and provided for, in nine, twelve, fifteen, and eighteen months, then this deed of trust shall be void, and the said Thomas M. Lanahan, trustee as aforesaid, shall reconvey the above described property to the said Edwin Walters, his heirs or assigns. But in case the said Edwin Walters shall fail to pay at maturity any one or more of his said creditors any instalment or portion of their respective claims or demands against him, as the same shall mature, then it shall be lawful for the said Thomas M. Lanahan, trustee as aforesaid, to at once take possession of all of the above described property, and to sell the same in his discretion at public or private sale, and for the most money that can be realized therefor, and upon such terms as to the credit payments as he shall think best calculated to promote the interests of all parties concerned in this trust, and the proceeds of all such sales shall be applied and appropriated by the said trustee as follows, that is to say:—

First. To the payment of the expenses incurred in the creation and execution of this trust, including such commissions to the said trustee, for his trouble and responsibility in the premises, as is usually paid to receivers for like services by courts of equity in the State of Maryland.

Secondly. To the payment of Thomas M. Lanahan, of Baltimore city, his personal representative or assigns, the full amount of a judgment recovered by said Lanahan against said Edwin Walters, in the circuit court for Baltimore County, in the State of Maryland, on the 21st day of August, 1874, for thirty thousand dollars, with interest until paid, and costs.

Thirdly. The balance remaining in the hands of the said trustee is then to be applied to the payment of all the other creditors of the said Edwin Walters, to whom he is indebted on the day of the date of the execution of these presents, in full, if sufficient therefor, and if not sufficient, then ratably and proportionably, and if then there shall remain a balance in the hands of the said trustee, the same shall be paid over to the said Edwin Walters or his assigns. It is distinctly understood and agreed that until default be made by the said Edwin Walters, in payment of some one or more of his said creditors, existing at the time of the execution of these presents, it shall be lawful for the said Edwin Walters to retain the possession and use of the property hereinbefore described, provided he shall keep said property sufficiently insured in the mean time, with a provision in the policies of insurance that if any loss is sustained by fire, the insurance money is to be paid over to the said trustee for the benefit of the creditors of said Walters, as provided for in this instrument. But if said Walters shall fail to keep said property insured as aforesaid, then it shall be lawful for said trustee to take possession of the same and sell it for the benefit of the creditors as above provided. It is also agreed that it shall be lawful for the said trustee, if he shall deem it advisable and for the interest of the creditors, at any time after the execution of these presents, and before the maturity of any of the payments due by said Walters to his said creditors, and before any default

made by said Walters in the premises, to make sale and conveyance of any or all of the above described property, provided the said Edwin Walters shall give his assent in writing to such sale; and when said sale shall be thus made, the trustee shall appropriate the proceeds to the payment of the creditors of said Walters as above provided. And the said Edwin Walters and Virginia Caroline Walters, his wife, covenant to execute such further assurances as may be necessary to confirm these presents.

The deed was duly acknowledged, and the grantee made affidavit that the consideration was true and *bonâ fide* as therein set forth.

Walters having made default in the payment of the first instalment due and owing, as provided in the deed, the trustee proceeded to sell certain property mentioned in the deed, located at Canton, in Baltimore County. The notice of sale was advertised in the Baltimore Sun and Baltimore American, two newspapers published in Baltimore city, and was sold on the 2d day of November, 1875, at the Exchange Sales Rooms in said city for the sum of \$31,500. The Bank of Commerce, the holder and owner of four promissory notes for \$2,000 each, made and signed by Edwin Walters, payable to the order of Edward McCann, and by him indorsed to the bank, filed exceptions on the 13th of November, 1875, to the ratification of the sale. These exceptions are set out in the opinion of the court. The four promissory notes held by the exceptant constituted a part of the indebtedness intended to be secured by the foregoing deed of trust. McCann was one of the creditors of Walters who united in the agreement for extension, and recommended the ratification of the sale. A commission issued, under which evidence was taken and returned. The exceptions were overruled, and the sale was finally ratified.

The cause was argued before Bartol, C. J., Miller and Alvey, JJ., and the decision was participated in by Robinson, J.

D. Eldridge Monroe, for the appellant. The instrument of writing, executed by Edwin Walters and wife, to Thomas M. Lanahan, is a mortgage within the meaning of art. 64 of the Code of Public General Laws, and the property therein mentioned, located in Baltimore County, should have been advertised and sold in the manner prescribed in said article, sections 7 and 14. See also Public Local Laws, art. 3, section 134. It was the conveyance of property as a security for the payment of an indebtedness in case of default, and clearly comes within the definition of Chancellor Kent, viz., "A mortgage is the conveyance of an estate by way of a pledge for the security of a debt, and to become void on the payment of it." 4 Kent's Comm. 136; *Wilson et al. v. Russell et al.* 13 Md. 494; *Flagg v. Mann et al.* 2 Sumner, 533; *Woodruff v. Robb*, 19 Ohio, 212; Story's Equity, 1018; *Wilcox v. Morris*, 1 Murph. (N. C.) 116; *Johnson's Ex'r v. Clarke*, 5 Ark. 321; *Sargent v. Howe*, 21 Ill. 149; *Crosby v. Huston*, 1 Texas, 240, 241; 2 American Law Register (New Series), 641 *et seq.*

This view of the law is consistent with the various decisions of this court. *Charles v. Clagett*, 3 Md. 82; *Stockett v. Holliday*, 9 Ib. 492; *Carson v. Phelps*, 40 Ib. 73; *McIntosh v. Corner*, 38 Ib. 605; *Hooper v. Knell*, 31 Ib. 555; *Wilson v. Russell*, 13 Ib. 494; *Snowden v. Pitcher & Wilson*, *ante*, p. 260.

If the instrument in question be a mortgage, within the spirit and meaning of art. 64 of the Code, the sale was illegally made, and this court will not ratify it, as notice of the sale was not advertised in a newspaper published in the county in which the property was located, nor was it offered for sale in said county. If proper notice be not given, chancery will set aside the sale. 4 Kent's Comm. 190; 6 Madd. 15; 2 American Law Register (N. S.), 713 *et seq.* If a statute points out a particular mode of notice, no other mode, even though it be a better one, can be substituted. *Dutton v. Cotton*, 10 Iowa, 408.

The fact that the instrument clothes the trustee with power, in his discretion, to sell at public or private sale, does not release him from the obligation to sell the property in the manner provided by law. Having elected to sell at public sale, he was bound to give legal notice of the same and make sale in a legal manner.

The power to sell by the trustee was derived from the instrument itself, and was a power coupled with a trust; and the trustee being clothed with large discretionary power, whether it be a mortgage or deed of trust, he was bound to exercise that diligence and caution which a careful and prudent owner would observe in the sale of his own property. *Gould, Trustee, et al. v. Chappell & Gould*, 42 Md. 466, and cases therein cited; *Hubbard and Wife v. Jarrell*, 23 Ib. 66.

No prudent owner would have brought this property to the hammer on a day so injudicious, — the day of the state election, — and under circumstances so disadvantageous; nor would he have sold it at a price so depreciated. The trustee must not only use good faith, but he must use every requisite degree of diligence to bring the property to sale under the best possible circumstances. *Gould et al. v. Chappell*, 42 Md. 466; 2 American Law Register (N. S.), 712, and cases therein cited.

Richard J. Gittings, contra.

The instrument in question is not a mortgage, but a deed of trust. It has neither the form nor the distinctive provisions of a mortgage. A mortgage is a security to the mortgagee. This is a conveyance for the benefit of *all* the creditors of the grantor having claims against him, at the time of its date. A mortgage must, under the statute, express the sum or sums of money for the payment of which it is intended the mortgage property shall be charged. This deed, except as to the judgment debt, an encumbrance necessarily to be paid irrespective of the deed, specifies no amounts, and could not have undertaken to *specify* them, consistently with its design, being intended for the security and benefit of all creditors, without distinction, known or unknown, and whatever the amount of their respective demands. There are several provisions in it, either unnecessary in a mortgage, as that for a reconveyance by the trustee, in the event of the grantor's paying all his debts within the stipulated period, or quite beyond the scope of a mortgage, as the power of sale given the trustee, with the assent of the grantor, before default, coupled with a trust to apply the proceeds to the payment of the creditors. And, while the instrument explicitly exhibits its own nature and purpose, and declares itself to be a deed of trust for creditors, it appears from the written agreement under which it was executed that it would have been a gross perversion to have turned it into anything else. The

agreement stipulated for "a deed of trust" which should "provide, first, for the payment of the liens and encumbrances due and owing upon the property, and secondly, for the payment of *all the other creditors* of said Edwin Walters, in equal proportions, and the balance, if any, to be paid over to said Edwin Walters."

Deeds for the protection of creditors may be divided into three classes. The first includes mortgages properly so called, that is, conveyances from the debtor to the creditor, expressed to be for the security of indebtedness due the latter, or for his indemnification against a particular loss, and with a clause of defeasance contained in the instrument. In such case, while the conveyance, after failure to perform the condition within the time specified, is apparently absolute, a purchaser from the grantee, without statutory aid given to the sale, does not acquire the land, but only the charge upon the land. In this class, or amongst mortgages properly so called, are embraced mortgages in trust, where the debts are specified, and the creditors either named or designated, and described in the instrument, but because of the great number of such creditors, or of other circumstances making a conveyance directly to them inconvenient, the mortgage is made to mortgagees who combine the office of trustees with that of mortgagees. These instruments, having the form of mortgages, are attended in general with the same statutory incidents. The second class consists of conveyances which are absolute in form, but being intended as securities of debt only, courts of equity, upon proof of the fact, will give effect to the intention, except as against the rights of *bonâ fide* purchasers, or other intervening equities. The third class consists of deeds of trust like the present. It is believed that the provisions of the Code, under the title "Mortgages," which have been invoked by the appellant, art. 64, sections 7 and 14, have reference to instruments of the *first* class only, namely, mortgages properly so called. A reason can be perceived why guards or restrictive provisions of this kind should be thrown around such instruments — mortgages intended as such and given as the ordinary security for debt — but none whatever for applying them to conveyances to trustees for the payment of creditors generally. *Charles v. Clagett*, 3 Md. 82; *Stockett v. Holliday*, 9 Ib. 480, 492, 499; *White v. Malcolm*, 15 Ib. 541; *Phillips v. Pearson*, 27 Ib. 256; *Reeside v. Peter*, 33 Ib. 120; *McIntosh v. Corner*, 33 Ib. 598, 607.

ALVEY, J., delivered the opinion of the court.

This appeal presents the case of exceptions to a sale made under a deed of trust, and reported for ratification by the court, as required by the Code, art. 81, sections 107 and 111, as reenacted with amendments by the Act of 1874, chapter 483.

The deed was made by the grantor in pursuance of an agreement with his creditors for an extension of time on his indebtedness; and the appellant, according to the allegation in the exceptions filed, is the holder of part of the evidences of such indebtedness of the grantor intended to be secured by the deed, and has thus become interested in the execution of the trust.

The ratification of the sale is excepted to on several grounds: First, because the property, although situated in Baltimore County, was sold in Baltimore city, regardless of that provision of the Code, art. 64, section

14, which requires that all mortgage sales shall be made in the county or city where the mortgaged premises are situated. Secondly, because the notice of sale was not given by advertisement in some newspaper printed in Baltimore County, where the property is situated; the Code, art. 64, section 7, requiring that all mortgage sales made in pursuance of the power authorized to be inserted in any deed of mortgage, where the notice is not provided for in the mortgage, or otherwise agreed upon, shall be made after twenty days' notice of the time, place, and terms thereof, by advertisement in some newspaper printed in the county where the mortgaged premises may be located. Thirdly, because the sale was not fairly made; that it was made on the day of a general state election; and that the property was sold for a grossly inadequate price.

The two first grounds relied on, those relating to the notice and the place of sale, are involved in and dependent upon the question, whether the deed of the 17th of November, 1874, under which the sale was made, is a mortgage, such as is contemplated by the Code, art. 64, section 5, which provides that in all mortgages there may be inserted a clause authorizing the mortgagee, or any other person to be named therein, to sell the mortgaged premises; the following sections, 7 and 14, before referred to, having reference to the manner of executing the power authorized to be inserted by the 5th section.

1. As to the question of the character of the deed, upon careful examination of its provisions, we are of opinion that it is not a technical mortgage, within the contemplation of the 5th section of the 64th art. of the Code referred to, but a deed of trust, clearly denominated such by the Code, art. 24, sec. 55. It is a deed of trust to secure debts; and while it has some of the attributes of a mortgage, yet it presents features which distinguish it from that class of security strictly considered. By the legal, formal mortgage, as distinguished from instruments held to be mortgages by construction of courts of equity, the property is conveyed or assigned by the mortgagor to the mortgagee, in form like that of an absolute legal conveyance, but subject to a proviso or condition by which the conveyance is to become void, or the estate is to be reconveyed, upon payment to the mortgagee of the principal sum secured, with interest, on a day certain; and upon non-performance of this condition, the mortgagee's conditional estate becomes absolute at law, and he may take possession thereof, but it remains redeemable in equity during a certain period under the rules imposed by courts of equity, or by statute. 1 Fish. on Mort. 7; *Jamieson v. Bruce*, 6 Gill & John. 72; *Evans & Iglehart v. Merriken*, 8 Ib. 39. And in accordance with this description of a strict legal mortgage is the formula given in the Code, art. 24, sec. 60. We do not, however, for a moment intimate that a mortgage can be in no other form than that here given; but the form to which we refer clearly indicates the attributes and essential qualities of a strict legal mortgage, as distinguished from a deed of trust, such as that now before us. This deed was made for the benefit of all the grantor's existing creditors; and the grant was made to and the estate vested in but one of those creditors, in trust to secure his own debt and the debts of all the other creditors, in the manner and upon the terms specified in the deed. Lanahan is the trustee, and the creditors are *cestuis que trust*, not mortgagees, strictly and technically such. Upon default of

payment, these creditors, as mere *cestuis que trust* under the deed, could not take possession of the estate and apply the rents and profits to the discharge of their claims; nor have they any right of foreclosure, such as a mortgagee would have under a technical mortgage. *Charles v. Clagett*, 8 Md. 94, 95. Their only remedy is the enforcement of the trust, and to execute the trust requires the property to be sold. Indeed, if this instrument were declared to be a mortgage, as contended by the appellant's counsel it should be, it would be difficult to maintain its validity at all, except as to the claim of Lanahan, the trustee. His is the only claim the amount of which is mentioned in the deed; in fact he is the only creditor named; the names and amounts of none others are stated. Now it is provided by the Code, art. 64, sec. 2, that "no mortgage, or deed in the nature of a mortgage, shall be a lien or charge on any estate or property for any other or different principal sum or sums of money than the principal sum or sums that shall appear on the face of such mortgage, and be specified and recited therein, and particularly mentioned and expressed to be secured thereby at the time of executing the same; this not to apply to mortgages to indemnify the mortgagee against loss from being indorser or security." It is plain, therefore, that this deed would be seriously imperilled by declaring it to be a mortgage, or even a deed in the nature of a mortgage; as the amounts of the debts intended to be secured, with one exception, are not made to appear on the face of the deed, nor specified and recited therein. This is not required in a deed of trust for the benefit of all the creditors of the grantor such as that in the present case.

The case of *Wilson v. Russell*, 13 Md. 495, relied on by the counsel of the appellant, and where the instrument in question was sometimes spoken of as a deed in the nature of a mortgage, and sometimes as a deed of trust, does not support the position of the appellant's counsel in this case. There the deed was not a conveyance for the benefit of creditors generally, nor an assignment of the property of the grantors for the payment of their existing debts; but it was intended to secure two named parties the payment of an old debt, and certain notes agreed to be loaned under the deed; the amount thereof being specifically stated on the face of the instrument. It was not pretended, in that case, that the deed was a technical mortgage.

Being of opinion that the deed before us is not a mortgage within the meaning of the Code, art. 64, sec. 5, it follows that the requirements of the 7th and 14th sections of the same article of the Code have no application to the sale made and reported by the trustee in this case.

2. Having determined that the deed is not a mortgage, but a deed of trust, and therefore not within the meaning of the Code, art. 64, sec. 5, the next question is, was the sale fairly made, and for a price that ought to be sanctioned by the court? And upon careful examination of all the evidence that the record contains we can have no hesitation in saying that there is nothing disclosed that would have justified the court below in refusing ratification of the sale. It is certainly true that the trustee was in duty bound to offer the estate under the best possible advantage for the interest of those for whom the trust was created. He was bound to due diligence in giving full and proper notice, so as to invite full and

fair competition at the sale; and he was further bound to act in perfect good faith throughout in his management in relation to the sale. He could not, in any degree, subserve the interest of one *cestui que trust* to the sacrifice or detriment of the rights of others equally interested. But bad faith or negligence on the part of the trustee will not be presumed, but, on the contrary, the presumption is that he has discharged his duty faithfully, and that presumption prevails until it is made to appear otherwise by those seeking to impeach the sale. Sales like the present are not to be impeached by slight circumstances. It requires good and substantial grounds to justify the court in setting them aside when regularly made; for otherwise all confidence in their performance and security would be destroyed, and the public would be loth ever to bid for property thus offered. The principles upon which the court acts in reference to these sales, when sought to be set aside, are well stated by the Vice-Chancellor, in the case of *Woodhull v. Osborne*, 2 Edwards Rep. 616, quoted with approval by this court in *Johnson v. Dorsey*, 7 Gill, 287. It was there said, that "where a stranger or third person becomes the purchaser in good faith, something more than a mere offer of a higher price must appear, to induce a resale; such as fraud or misconduct of the master, or other person, having the control of the sale, or surprise upon the party interested, or his having been misled as to the time and place of sale. Where circumstances of the latter description are relied upon, the party must show they proceeded from or were caused by the purchaser, or some person connected with or having the management of the sale. If he be of full age and under no disability, he cannot be permitted to allege his own negligence or inattention as the cause of his surprise or mistake." Here there is no pretence that there has been surprise or mistake on the part of those representing the appellant. More than usual diligence appears to have been observed in giving notice in all directions where bidders were likely to be found; and all the creditors, as well as the public generally, appear to have had the amplest notice of the time and place of sale. Many of the creditors appear to be persons of large means, and if they did not attend the sale and make the property bring a better price, it would seem to be their own fault. Several of the creditors were present at the sale, but did not bid. The sale was conducted by an experienced auctioneer, at the Exchange Sales Rooms in the city of Baltimore, within convenient distance of the location of the property, and there is no suggestion that there were any unfair means used in the mode of conducting the sale; but, on the contrary, the proof shows that the fullest opportunity was afforded every one to bid who desired to do so. That the sale took place on the day of the general state election can, of itself, certainly form no sufficient ground for setting it aside. It is not shown that a single individual was prevented from attending the sale by reason of the election. The proof is that the attendance was fair, the number being about as great as usually attend such sales. And as to the inadequacy of price, that is not of a character to justify the rejection of the sale. In regard to the salable value of property there is always more or less diversity of opinion, even among those who are supposed to be competent judges. Every controverted case in regard to the value of property exemplifies the truth of this remark. But, with all the diver-

sity of opinion upon this subject, no witness ventures to say that he will give more than the bid reported, if the property should go to resale. Indeed, they say they would not; and there is nothing in any portion of the evidence that gives any degree of assurance that, if the property were put up at resale, it would bring more than the price reported. Why then order a resale? The sale reported should not be set aside and a resale ordered as a mere experiment. That is forbidden both by reason and the well established doctrine of the law upon the subject. No principle is better established or more uniformly applied than that mere inadequacy of price, standing by itself, is not sufficient to vacate a sale, unless it be so gross and inordinate as to indicate some mistake or unfairness in the sale for which the purchaser is responsible, or misconduct or fraud on the part of the trustee. This is the doctrine maintained by this court in the cases of *Cohen v. Wagner*, 6 Gill, 236, and *Johnson v. Dorsey*, 7 Ib. 269, where the subject is fully considered. The proof in this case wholly fails to show any such gross inadequacy of price, if inadequate at all, as to indicate that there was either mistake or unfairness in the sale, or that the trustee has been guilty of any misconduct in relation to it. Moreover, in considering the question of the ratification of this sale, it should not be overlooked that a decided majority of the creditors in interest have strongly recommended that the sale should be ratified, being of the opinion, as they state, that the property would not sell for as much on resale as the price reported by the trustee.

Upon the whole, finding no sufficient ground for vacating the sale reported by the trustee, the order appealed from will be affirmed, with costs to the appellees.

Order affirmed, and cause remanded.

INDEX.

ADMIRALTY.

1. Under the local law of Louisiana claims for materials and supplies furnished a vessel in her home port are a lien on the vessel, if recorded in the proper parish. Without such registry they have no privilege or priority over subsequent mortgages recorded by authority of the act of Congress, or claims of later date recorded by authority of the state law. *The John T. Moore*, 406.
2. Claims for materials and supplies furnished in the home port, even if duly recorded, are postponed to maritime liens. *Ib.*
3. The registry of a mortgage on a vessel to be effectual must be made in the custom-house of her home port. *Ib.*
4. Where the mortgagee of a mortgage on a vessel, which was recorded in the proper custom-house, had notice of a prior unrecorded mortgage, his mortgage was postponed to the unrecorded mortgage. *Ib.*
5. Where A. had an unrecorded mortgage on a vessel, and B. had a mortgage on the same vessel of later date, duly recorded under the act of Congress, but had actual notice of the mortgage of A., and C. had a lien by virtue of the registry of his claim under the state law, subsequent in date to the mortgages of both A. and B., but C. had no notice of the mortgage of A., and the claim of either A. or B. was sufficient to absorb all the proceeds of the sale of the vessel: *Held*, that said proceeds should be first applied to the mortgage of A. *Ib.*
6. The fact that a mortgage on a vessel has not been acknowledged before a notary public, or other officer authorized to take acknowledgment of deeds, precludes its registry, but does not render it void as against the mortgagor, nor postpone it to the recorded mortgage of a subsequent mortgagee who had notice of such unrecorded mortgage. *Ib.*
7. The wages of a watchman employed on a vessel while lying-up in port are not a maritime lien. *Ib.*
8. There is no maritime lien for the premium due on a policy of insurance taken on a vessel by her owners. *Ib.*
9. Where the vacillation of a sailing vessel in the exhibition of her lights is the cause of a collision with a steamer, the steamer held not to have been in fault, even though the collision might have been avoided if the steamer had adopted a course different from that pursued. *Marshall v. The Adriatic*, 353.

BAILOR AND BAILEE.

If a seller of merchandise, in order to maintain his lien for its price, refuses to permit the purchaser to take possession or control of it, he thereby prevents an acceptance and receipt of it by the purchaser within the statute of frauds. Upon an agreement for the sale of merchandise and payment therefor by a satisfactory note, the purchaser examined the merchandise, had it weighed, marked with his initials, and piled up by itself in the seller's warehouse, to be taken away upon payment for it or giving a satisfactory note for its price. The purchaser never complied with these terms, and the seller refused to allow him to take the merchandise away, claiming a lien upon it for its price. After remaining for several months it was destroyed in the warehouse by fire. *Held*, that there was no such delivery of the merchandise as to constitute the seller a bailee for the purchaser. *Safford v. McDonough*, 96.

BANKRUPTCY.

1. After a bankrupt had been discharged, a large fund was recovered in a suit against the United States in the court of claims, by counsel employed by him before his bank-

- ruptcy, on a contract that they should carry on the suit to recover the same at their own costs and charges, and have and retain for their compensation one half the amount recovered. The fund so recovered being in possession of the bankrupt court, the bankrupt filed his petition, praying that the share of his said counsel in the fund might be paid to them, that a sufficient sum might be set apart to pay all debts proven against his estate, and also the costs and commissions of the bankruptcy, and that the residue might be paid over to himself; *held*, that such a petition was one in the ordinary course of a bankrupt proceeding, and was not a bill in equity, nor did the relief prayed for require the filing of a bill in equity; nor was a decree of the bankrupt court, directing the payment to said counsel of their share in the recovery, the allowance of a claim against the bankrupt estate. The proper method, therefore, to reverse a decree made on such a petition was not by appeal, but by petition, addressed to the supervisory jurisdiction of the circuit court. *Maybin v. Raymond*, 21.
2. The common law on the subject of champerty and maintenance has not been generally adopted in this country, the reasons on which the law was founded not existing here. Therefore a contract such as that mentioned in the first head-note, made by a party with his counsel, is not an unlawful, but is a valid and binding contract. *Ib.*
 3. Upon the facts stated in the first head-note, the attorneys who recovered the judgment were entitled to one half the amount recovered, notwithstanding the subsequent bankruptcy of the party with whom they contracted, and notwithstanding the recovery was subsequent to the bankruptcy. *Ib.*
 4. A paper writing purporting to be the discharge of a bankrupt, without date, signed by the register without application therefor by the assignee, and which by inadvertence has found its way among the records of the court, does not put an end to the powers of the assignee, or terminate the bankruptcy proceedings; it is no part of the record, and may be ordered by the court to be stricken from the files. *Ib.*
 5. The discharge of a bankrupt is not such an adjudication of the fact that he has surrendered all his property for the benefit of his creditors as to bar the right of his assignee to recover property discovered after the discharge, and which the bankrupt had failed to place upon the schedule. *Ib.*
 6. Where an assignee in bankruptcy more than two years after his appointment is substituted for the bankrupt as plaintiff in a suit pending in the bankrupt's name, and recovers a sum of money in the suit, the bankrupt cannot claim from the assignee the money so recovered, on the ground that the cause of action in favor of the latter was barred at the time he was substituted as plaintiff in the suit. *Ib.*
 7. Where authority was obtained from the bankrupt court upon the application of the assignee to make the contract mentioned in the first head-note for the prosecution of a claim due the bankrupt estate, the court being kept in ignorance of facts which, if known to it, would surely have induced it to withhold such authority, the contract is not binding on the court or on the bankrupt estate, especially when the attorneys with whom the contract was made knew that the assignee had not communicated such facts to the court. *Ib.*
 8. Under the Bankrupt Act of 1867, the assignee might sue in the state courts to recover the assets of the bankrupt, no exclusive jurisdiction being given to the courts of the United States. Whether such exclusive jurisdiction is given by the Revised Statutes, *quære*. *Claffin v. Houseman*, 51.

BILLS AND NOTES.

1. A building association was organized in August, 1871, under the general incorporation law of a state, and by the 9th and 11th articles of its association it was provided that its board might issue promissory notes on mortgages only, and that such notes should always be drawn to the order of the mortgagor, who should in all cases indorse the note thus drawn. The president, secretary, treasurer, and three directors were authorized to sign all promissory notes issued by the association. Under the authority of these articles the association issued its note to the appellees instead of money, for which a mortgage was given. The note was strictly in form a promissory note, payable to the order of the appellees. It was drawn at sixty days' time, and payable at a certain named bank; and was signed by the officers designated in the articles of association to execute promissory notes. In one corner of the face of the note there was the type or emblem of what was alleged to be the seal of the corporation; this alleged seal consisted simply of an emblem or symbol printed by the printer at the time when the printed blank note was struck. The note was indorsed by the payees, and by them negotiated, and at maturity was duly presented for payment, and was

- dishonored and protested, and notice given by the notary to the said indorsers, and payment duly demanded of them. Suit was brought on the note by the indorsees against the indorsers, who contended that they were not liable by reason of their indorsement, because the instrument sued on was a single bill. *Held*, That the note was negotiable, and that by the indorsement thereof in the ordinary way, the indorsers became liable. That the nature of the transaction itself, the objects and purposes to be subserved by the issue of the note, as well as its form, indicated that the parties must have understood, that it would be so accepted and dealt with by the commercial community. That the printed representation of the seal, if it be conceded to be a sufficient seal, was not printed on the note to restrain its negotiability, or to change it into a specialty, but rather as a mark of genuineness. That the note in no manner depended upon the seal for its validity, but derived its authenticity from the signatures of the officers authorized to execute it. *Jackson v. Myers*, 18.
2. A holder of negotiable paper, who takes it before maturity for a valuable consideration, in the usual course of trade, without knowledge of facts which impeach its validity between antecedent parties, holds it by a good title; but circumstances tending to show bad faith or fraud in taking such paper are admissible in evidence, and the establishment of such bad faith or fraud, whether by direct or circumstantial evidence, subjects the holder of paper so taken to defences existing between antecedent parties. *Johnson v. Way*, 58.
 3. The payee of a check which has not been accepted by the bank on which it is drawn cannot maintain an action upon it against the bank. Until acceptance there is no privity of contract between the payee and the bank. So held where a check of the treasurer of the United States upon a depositing bank had been paid upon an unauthorized indorsement of the name of the payee, and where the action was brought by the true owner of the check. It does not alter the rule that there has been a settlement of accounts between the treasurer and the bank, and the check in question was allowed in the account to the credit of the bank, upon the supposition that it had been properly paid. Such erroneous allowance does not affect the real state of the accounts, but is open to correction when discovered. Payment to a stranger upon an unauthorized indorsement does not operate as an acceptance of the check, so as to authorize an action by the real owner to recover its amount as upon an accepted check. *First National Bank of Washington v. Whitman*, 254.
 4. An indorser of a promissory note is a competent witness to prove an agreement in writing made with its holder at the time of his indorsement, that he shall not be held liable thereon, where the paper has not afterwards been put into circulation, but is held by the party to whom the indorsement was made. *Davis v. Brown*, 337.
 5. The case of the *Bank of United States v. Dunn*, reported in 6th Peters, explained and qualified. *Ib.*
 6. An agreement like the one mentioned above and the indorsement, taken together, are equivalent, so far as the holder of the note is concerned, to an indorsement without recourse to the indorser. *Ib.*
 7. The omission of indorsers on a series of notes, transferred to the holder in settlement of their own note held by him, upon an agreement in writing that they should not be held liable on their indorsement, to set up the agreement as a defence to an action against them, brought by the holder on two of the notes, does not preclude them from setting up the agreement in a second action by the holder on others of the same series of notes. The judgment in the original action does not operate as an estoppel against showing the existence and validity of the agreement in the second action. *Ib.*
 8. When a judgment in one action is offered in evidence in a subsequent action between the same parties upon a different demand, it operates as an estoppel only upon the matter actually at issue and determined in the original action; and such matter, when not disclosed by the pleadings, must be shown by extrinsic evidence. *Ib.*
 9. Paper that is payable on demand is due at date. The collection of paper that is payable on demand, or at a fixed time, is barred by the statute of limitations, at the expiration of the statutory period from the date at which it became payable, whether demand has been made or not. *Palmer v. Palmer*, 366.

See PRINCIPAL AND SURETY.

BUILDING ASSOCIATION.

See BILLS AND NOTES, 1.

CHECK.

See **BILLS AND NOTES**, 3.

COMMON CARRIER.

1. A common carrier is one that undertakes for hire or reward to carry, or cause to be carried, goods for all persons indifferently who may choose to employ him, from one place to another. *United States Express Co. v. Backman*, 328.
2. An express company, that receives and agrees to transport goods from one designated place to another designated place, for a compensation, in the ordinary means of conveyance, is a common carrier, although not the owner, and having no interest in the conveyance by which the goods are transported. *Ib.*
3. A common carrier is liable for the value of the goods lost through its negligence, notwithstanding the bill of lading provides that the carrier shall not be liable beyond an amount named therein, when it is understood by the parties that the sum so agreed on is less than the value of the goods. Such an agreement can at most cover a loss arising from some cause other than the negligence or default of the carrier or his servants, and the rule of damages is the same, although less is charged and paid for the transportation than when the exempting clause is omitted. *Ib.*
4. In an action on the ground of negligence against a common carrier upon a bill of lading containing an exemption from liability from loss by fire, the burden of proof is on the carrier to show that the loss occurred within the terms of the exemption, and that the loss occurred without fault on his part. *Ib.*
5. A common carrier is liable for loss or injury caused by delay resulting from the refusal of its employees to do duty; but is not liable for loss or injury caused by delay resulting from the lawless violence of former employees "on a strike." *Pittsburg, Ft. Wayne & Chicago R. W. Co. v. Hazen*, 83.
6. While a common carrier may restrict by contract his liability in matters not inconsistent with public policy, he cannot legally contract against liability for the negligence of himself, his agents, or servants. *President, &c. of the Bank of Kentucky v. Adams Express Co.* 132.
7. A railroad company which provides a place for, and carries on its trains, messengers of an express company, becomes the agent of the express company, notwithstanding the servants of the railroad company are not under the control of the express company. *Ib.*
8. A common carrier has no power to constitute another person or corporation the agent of his consignor, or consignee. He can only employ a subordinate agency. *Ib.*
9. A stipulation that an express company will not be liable for the loss of a package by fire does not relieve the company from liability for loss by fire caused by the negligence of the railroad company transporting its messenger. *Ib.*
10. While the consignor of the express company may sue the railroad company for the loss of packages by its negligence, such right comes through the contract between the express and railroad companies. *Ib.*
11. As to whether a railroad company is liable, as a common carrier, to an express company when the latter by its messenger retains the custody of the package, *quære*. *Ib.*
12. A common carrier may show, as an excuse for non-delivery of goods pursuant to his bill of lading, that he has delivered the goods upon demand to the true owner. *Hentz v. The Idaho*, 152.

CONSTITUTIONAL LAW.

1. Until Congress makes some regulation touching the liabilities of parties for marine torts resulting in death of the persons injured, the statute of Indiana giving a right of action to the personal representatives of the deceased, where his death is caused by the wrongful act or omission of another, applies, the tort being committed within the territorial limits of the state; and as thus applied it constitutes no encroachment upon the commercial power of Congress. *Sherlock v. Alling*, 38.
2. The action of Congress as to a regulation of commerce or the liability for its infringement is exclusive of state authority; but until some action is taken by Congress, the legislation of a state not directed against commerce or any of its regulations, but relating generally to the rights, duties, and liabilities of citizens, is of obligatory force within its territorial jurisdiction, although it may indirectly and remotely affect the operations of foreign or inter-state commerce, or persons engaged in such commerce. *Ib.*

3. It is within the power of a state to fix by law the maximum of charges for the storage of grain in warehouses in the state, although the grain is stored in bulk in such manner that the identity of different lots is not preserved. A statute fixing such maximum is not repugnant to any of the provisions of the Constitution of the United States. 1. It does not "regulate commerce," within the meaning of section 8, article I. 2. It does not give a "preference . . . to the ports of one state," within the meaning of section 9, article I. 3. It is not contrary to that part of the XIVth Amendment which provides that no state shall "deprive any person of life, liberty, or property, without due process of law." *Munn v. The People*, 165.
4. Where a corporation is assessed on its gross receipts, under the provisions of "an act for the assessment and taxation of express and telegraph companies" (S. & S. 769-771), and pays such assessment to avoid the penalties and disabilities incurred by a refusal to pay, but under protest and after notifying the treasurer that an action would be brought to recover back; such payment is not voluntary, and an action may be maintained to recover back the amount so paid, if the tax is illegal. *Western Union Telegraph Co. v. Mayer*, 499.
5. The privilege that a foreign corporation enjoys by legislative consent of exercising its corporate powers, and of carrying on its business within the state, is not *property* within the meaning of article 12, section 2, of the state Constitution. The provisions of "an act for the assessment and taxation of express and telegraph companies" (S. & S. 769-771), as amended, which requires a foreign telegraph company to pay a tax on its gross receipts for the year next preceding the return for assessment, at a rate equal to that on property, and prohibits any person from acting as agent, or transacting any business for such company that is in default of payment, are, in effect, a charge for the privilege of exercising its franchises and powers within the state, graduated according to the amount of receipts, not in conflict with any of the limitations on the power of taxation vested in the general assembly. *Ib.*
6. A state has power to control the rates of fare and freight charged by a common carrier within its jurisdiction. The doctrine of *Munn v. The People*, applied. *Chicago, Burlington, & Quincy Railroad Co. v. Cuts*, 174.
7. Where a sentence not authorized by law has been imposed upon a prisoner, the court of appeals can only reverse the judgment; it has no power to impose the proper sentence, or to remand the case to the court of original jurisdiction for that purpose. Where the accused was illegally sentenced and judgment reversed on this ground by the appellate court; *held*, that the accused could not be again tried for the same offence. *McDonald v. The State*, 484.

CONSTRUCTION OF STATUTES.

Plaintiff, a guest at defendant's inn, retired without locking the door of his room. During the night his watch, money, and other property, which had been left upon a chest of drawers near the door, were stolen. By section 1 of 26 & 27 Vict. it is provided that no innkeeper shall be liable to make good any loss of property brought to his inn, except when such property shall have been "stolen, lost, or injured through the wilful act, neglect, or default of such innkeeper, or any servant in his employ." Section 3 of said act requires the innkeeper to exhibit a copy of section 1 in a conspicuous part of the entrance to his inn. Defendant caused a notice purporting to be a copy of section 1 to be placed in the entrance to his inn, but the word "*act*" was omitted. *Held*: (1) that the innkeeper was not protected by the statute; (2) that the question of negligence was properly left to the jury. *Spice v. Bacon*, 448.

CONTRACT.

1. A contract for the sale and purchase of wheat to be delivered in good faith at a future time is not void as a "wagering contract;" but when under such an agreement it is understood by the parties that no wheat is to be delivered, but only a payment at the time appointed of the difference between the contract and the market price, it thus becomes a wagering contract and the law will not enforce it. *Rumsey v. Berry*, 64.
2. The plaintiffs in good faith, at the request and for the benefit of the defendant, made an agreement for the sale of wheat to be delivered within a certain time, at the option of the defendant, he to furnish sufficient "margin" to secure them against loss. The defendant failed to comply with his part of the contract, and a loss ensued. *Held*, that under such a contract the law will give to the plaintiffs a remedy for their loss. *Ib.*

3. Where the defendant verbally contracted with the plaintiffs for the purchase of a quantity of ice to be afterwards delivered, and after the breach of the contract by the defendant, the parties put the contract into writing, in the terms as before agreed upon verbally, antedating it as an original contract of the date of the verbal contract first made, in an action upon the contract commenced after, but declaring upon a breach which occurred before, the writing was made, the writing is sufficient evidence of the prior verbal contract to satisfy the statute of frauds. *Bird v. Munroe*, 435.
4. In such case, in view of the statute of frauds, the writing is not to be regarded as constituting the contract itself, but as merely the necessary evidence by which the contract may be proved. *Ib.*
5. Parol evidence is admissible, to show that the date of the writing was not an erroneous, but an intentional one, and that the parties intended thereby to create written evidence of the unwritten contract before made. *Ib.*
6. An agreement to submit to arbitration, the effect of which is to oust the courts of jurisdiction, is invalid. *Pearl v. Harris*, 533.
7. A bill in equity for an account of a copartnership, one of the articles of which provided for the submission of disputed matters to arbitration, need not allege a refusal to refer by the defendants; and the defendants cannot defeat the jurisdiction of the court by alleging that they are and have been willing to refer under the articles of copartnership. *Ib.*
8. Where, during the late war, a creditor resided within the territory of one of the belligerent powers, and his debtor within that of the other, such debtor is, under the rules of public law, entitled to abatement of interest during the continuance of the war. *Roberts v. Cocke*, 534.
9. Where the debtor and creditor reside within the same territory, the mere existence of war does not furnish such a legal ground for abatement of interest. *Ib.*
10. In contracts for the payment of a sum certain, interest on the principal sum is a legal incident of the debt: the right to it is founded upon the presumed intention of the parties. *Ib.*
11. Wherever there is a contract, express or implied, for the payment of legal interest, the obligation of the contract extends as well to the payment of interest as it does to the payment of the principal sum; and neither court nor jury ever had the power to dispense with the performance of such contracts in whole or in part. *Ib.*
12. The laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of the contract, whether such laws affect its validity, construction, discharge, or enforcement.

See BANKRUPTCY.

CORPORATION.

1. The Northern Central case. *State v. No. C. R. R. Co.* 230.
2. Under the clause of the Constitution of the United States, extending the judicial power of the United States to controversies between citizens of different states, a corporation, in respect to the jurisdiction of the federal courts, is regarded as a citizen of the state where it was created. *Baltimore & Ohio Railroad Co. v. Cary*, 391.
3. A foreign railroad corporation, by merely leasing, possessing, and operating in this state the property of a domestic railroad corporation, does not thereby become an Ohio corporation, nor such citizen of the state. *Ib.*
4. The proviso of the 24th section of the act for the creation and regulation of incorporated companies in Ohio, as amended March 19, 1869 (66 Ohio L. 32), so far as it provides that the leasing, purchasing, or operating a railroad in this state by a railroad company of another state shall be regarded as a waiver of the right of such foreign company to remove cases brought against it in the state courts to those of the United States, is repugnant to the Constitution and laws of the United States, and is, therefore, ineffective as a statutory waiver of the right of such removal. *Ib.*
5. When a corporation of another state, not being a citizen of Ohio, is sued by a citizen of the state, in the state court, it is entitled to have the case, under the 12th section of the Judiciary Act of Congress of 1789, removed from the state court to a United States court. *Ib.*

CRIMINAL LAW.

1. The prosecution cannot attack the character of the prisoner unless he first puts that in issue by offering evidence of his good character. *State v. Lapage*, 411.

2. The prosecution cannot show the defendant's bad character by showing particular acts. *Ib.*
3. The prosecution cannot show in the prisoner a tendency or disposition to commit the crime with which he is charged. *Ib.*
4. The prosecution cannot give in evidence other criminal acts of the prisoner, unless they are so connected by circumstances with the particular crime in issue as that the proof of one fact with its circumstances has some bearing upon the issue on trial other than such as is expressed in the foregoing three propositions. *Ib.*
5. The ingredients necessary to constitute murder in the first degree having been proved, the circumstance that the killing was preceded by a verbal dispute and by violent threats uttered by the deceased will not reduce the grade of the offence. *Green v. The Commonwealth*, 189.
6. In a criminal case, the fact that an isolated part of a charge may be open to doubt, when read without regard to the other parts thereof, is not sufficient ground for reversal. *Ib.*
7. An indictment found by a grand jury drawn by virtue of venires not having the seal of the court upon them, is illegal and void; and the defect is one which cannot be cured by amendment, or by special act of the legislature. *State v. Flemming*, 272.
8. In a criminal case a plea in abatement is sufficient, if it is free from duplicity and states a valid ground of defence to an indictment in language sufficiently clear not to be misunderstood; the strictest technical accuracy, such as is sometimes required in purely dilatory pleas in civil suits, will not be exacted. *Ib.*
9. An indictment may contain two or more counts alleging distinct offences, if they are of the same general description, and the mode of trial and the nature of the punishment are the same. *Commonwealth v. Brown*, 292.
10. The provisions of the Gen. Sts. c. 132 (Mass.), as to the selecting and drawing of jurors, are within the constitutional authority of the legislature. *Ib.*
11. The St. of 1875, c. 5 (Mass.), providing that the grand jurors, empanelled at a certain time of the superior court, for the county of Suffolk, and who were citizens of the class qualified by the general laws to serve as grand jurors, "shall for all purposes be deemed and held to be the grand jury of said county, duly and legally drawn, summoned, returned, and empanelled," until a certain time, "notwithstanding any irregularity in any writ of *venire facias*, or in the drawing, summoning, returning, and empanelling of said grand jurors," is constitutional as to indictments found by said grand jurors after its passage. *Ib.*
12. If a bad plea in bar in a criminal proceeding, which presents merely a question of law, is submitted to a jury, and, after a verdict thereon for the commonwealth, overruled by the judge, the defendant has no ground of exception to the order submitting the question to the jury, or to the rulings at the trial of the plea. *Ib.*
13. Upon the trial of an indictment for an illegal operation upon a woman, with intent to procure a miscarriage, an officer was permitted to testify that he took the defendant, after his arrest, into the presence of the woman, and asked her if the defendant performed an operation upon her; that the woman said he did; that the defendant asked the woman if she had been operated on previously by any other person; that the woman said, "No, she came there to be operated on to get rid of a child." *Held*, that the evidence was admissible. *Ib.*
14. Upon the trial of an indictment for an illegal operation upon a woman, with intent to procure a miscarriage, certain surgical instruments and a speculum chair, found in the defendant's house, were exhibited to the jury. There was evidence that the chair had been used in performing the operation, and medical experts were allowed to testify that the surgical instruments were adapted to producing abortions, although none of them could be said to be so exactly designed for such use as not to be appropriate also for use in lawful acts of surgery. *Held*, the defendant had no ground of exception to the admission of this evidence. *Ib.*
15. Medical books cannot be read in evidence to the jury. *Ib.*
16. No exception lies to the refusal of the judge presiding at the trial of a criminal case, to give instructions as to matters of fact. *Ib.*
17. No exception lies to a refusal to instruct the jury in the precise words requested, if the instruction is given in substance. *Ib.*
18. Upon the trial of an indictment for an illegal operation, with intent to procure a miscarriage of a woman who had applied to the defendant for that purpose, the woman testified as a witness, and the defendant requested an instruction that, though she was not to be considered as an accomplice, the jury were to take her statements "with great circumspection and caution and discredit." This was refused; but the judge

- instructed the jury that the fact that the witness was implicated in the alleged acts of the defendant might be considered as affecting her credibility and the weight of her testimony. *Held*, that the defendant had no ground of exception. *Ib*.
19. An indictment under the Gen. Sts. c. 165, § 9, alleged that A. B., at a time and place named, "with force and arms, did unlawfully use a certain instrument, a more particular description of which is to said jurors unknown, by then and there forcing and thrusting said instrument into the body and womb of one C. D., being then and there pregnant with child, with the intent of him, said A. B., thereby then and there to procure the miscarriage of the said C. D.," and concluded in the usual form. *Held*, that the indictment was sufficient. *Ib*.
 20. Where an application is made for a discharge, under section 162 of the Criminal Code (66 Ohio L. 311), at any term of the court, on the ground that the defendant, who had given bail for his appearance, was not brought to trial before the end of the third term after the indictment was found, such application should be refused, if at such term the state is ready for trial, although the cause cannot be tried for want of time at such term. *Erwin v. The State*, 357.
 21. Where, on the trial of a criminal cause, a juror is challenged by the defendant for cause, and the challenge is improperly refused; but such juror is afterward excused on a peremptory challenge, the judgment will not be reversed for such error, if an acceptable jury be empanelled before the defendant has exhausted his right to peremptory challenges. *Mims v. The State*, 16 Ohio St. 221.
 22. Intention or purpose to kill may be present in the crime of manslaughter, where the killing is without malice upon a sudden quarrel. *Ib*.
 23. Where death is caused by the use of a deadly weapon, and the circumstances of the killing are detailed to the jury, some of which tend to disprove a malicious or intentional killing, it is misleading to charge the jury "that in *this* case the law raises a presumption of malice in the defendant, and an intent on his part to kill the deceased." *Ib*.
 24. Where a person in the lawful pursuit of his business, and without blame, is violently assaulted by one who manifestly and maliciously intends and endeavors to kill him, the person so assaulted, without retreating, although it be in his power to do so without increasing his danger, may kill his assailant if necessary to save his own life or prevent enormous bodily harm. *Ib*.
 25. In a criminal case, a witness, who testifies to the doing of the act charged against the defendant, may be asked who the person was who did it, and no exception lies to the admission of his answer, "That man," pointing to the defendant. *Commonwealth v. Whitman*, 475.
 26. On an indictment for larceny, the evidence tended to prove that a boy was sent to the office of A. with money for him; that he found B. in the office, who, on being asked, said he was not A., and that he was going to stay until A. came in; and that the boy handed the money to B., on his signing a receipt therefor, which he did in the name of A. by C., signing a false name instead of his own. The defendant asked the judge to rule that "to constitute larceny, there must be an appreciative act of personation, and that if B. said he was not A., there was no larceny." The judge gave this instruction, with the addition, "unless B. held out some inducement to the boy to lead him to believe that he had the right to sign the receipt and receive the money for A." *Held*, that the defendant had no ground of exception. *Ib*.
 27. On the trial of an indictment for larceny, there was evidence identifying the prisoner as the person who had committed the act at the office of A., by a boy who was sent to that office with a receipt for A. to sign. On the receipt was written "twenty minutes past two," denoting the time when the boy started on his errand. A witness for the government who had an office in the same building as A., testified that at about thirteen minutes to two o'clock he passed the door of A.'s office and saw the prisoner there alone. *Held*, that the defendant had no ground of exception to the admission of this evidence; and that the government, by putting the receipt into the case, was not bound to concede that the interview between the prisoner and the boy was after twenty-two minutes past two o'clock. *Ib*.
 28. At the trial of an indictment for larceny, it appeared that a boy was sent to an office with a package, and that a man in the office took the package and signed a receipt for it. The government offered in evidence a receipt for a watch, admitted to be signed by the defendant. The judge instructed the jury that "the only legitimate use of the watch receipt was for the comparison of hands, and if the jury believed that the same person wrote the watch receipt and the name attached to the receipt which the boy took, it was evidence tending to show that the man who was in

the office, of whom the boy testified, was the defendant." *Held*, that the defendant had no ground of exception. *Ib.*

29. At the trial of an indictment for larceny, alleging the property stolen to be in "the District Telegraph Company, a corporation duly established by law," it appeared that the District Telegraph Company, a corporation organized under the general law of New York for the incorporation of telegraph companies, received a package of money to deliver, and sent a boy to make the delivery. The government put in evidence a copy of the Statutes of New York, containing this general law, and also an attested copy of the articles of association, under which the company was organized, from the office of the secretary of state of New York, where the law required the original to be deposited. It appeared that the company had undertaken to do business in the city of Boston under its New York organization, by delivering messages, and that this boy was one of its messengers. The judge instructed the jury "that the court was not bound to say whether the company had or had not authority to do business under its New York charter in the city of Boston; but that if the jury found that it was incorporated under the law of New York as the District Telegraph Company, and attempted to do business here under its organization, and received this money and undertook to deliver it through this boy, as its agent, then it might be considered as having especial ownership in this property, which would be sufficient under this indictment." *Held*, that the evidence was rightly admitted, and that the defendant had no ground of exception to this instruction. *Ib.*

DEED.

1. To constitute a delivery of a deed, the grantor must, by act, or word, or both, part with all right of possession and dominion over the instrument, with the intent that it shall take effect as his deed, and pass to his grantee. *Brown v. Brown*, 442.
2. The commitment of a deed to a third person, with the reservation of the right on the part of the grantor to withdraw it at any time before his death, and in case it was not so withdrawn, to be retained until the death of the grantor, and then to be delivered to the grantee, is no legal delivery, and will pass no title to the grantee. *Ib.*
3. Deed of trust defined, &c. *Bank of Commerce v. Lanahan*, 543.

ESTOPPEL.

See **BILLS AND NOTES**, 7; **JUDGMENT**, 2, 3, 4, 6, 7.

EVIDENCE.

1. In an action for injuries involving the loss of an arm, plaintiff may introduce evidence to show what must be the effect of his injuries in disqualifying him from pursuits requiring two hands. *Norfolk & Petersburg R. R. Co. v. Ormsby*, 117.
2. In an action brought by a mortgagee against one who has injured the mortgaged property by a removal of fixtures, evidence that the mortgagee, after the alleged injury and before the action was brought, under the power in his mortgage sold the mortgaged premises for more than enough to pay his debt and all prior incumbrances, is admissible in mitigation of damages. *King v. Bangs*, 287.
3. Where a person to whom a letter was addressed has been dead for several years, leaving no personal representative of whom inquiry could be made concerning it, and the letter is not shown to have been of such importance as to require its preservation, it may well be presumed that the letter has been lost or destroyed, and secondary evidence of the address written on it may be admitted. *Jones v. Jones*, 489.
4. In a trial involving the question, whether a particular person was the legitimate child of his alleged parents, evidence of his personal resemblance to his alleged father is not admissible. *Ib.*
5. To render admissible the deposition of a deceased witness taken in an equity cause, it is incumbent upon the party offering the deposition to prove the bill and answer in the cause. *Ib.*
6. The offer of the deposition should be accompanied with a proffer to show that it was the deposition of a deceased witness taken under oath, in a judicial proceeding, involving substantially the same question or matter in dispute as that on trial, to which the plaintiff and defendant in the suit on trial were parties, and that the party against whom it is sought to be used had the right and opportunity to cross-examine the witness. *Ib.*

7. It is improper to offer *all* the *original* papers in the former cause without disclosing of what the papers consisted. *Ib.*
8. Not all the proceedings in an equity cause can be offered in order to let in the deposition of a deceased witness, but only such parts of the proof as show the nature of the cause, and the parties to the controversy; and they are not to be received as evidence for the jury, but for the court only, to enable it to determine whether the deposition is evidence proper to be allowed to go to the jury. *Ib.*
9. In order to prove the existence of a record which does not belong to the same court, the proof must be by transcript under seal, and not by the original papers. *Ib.*
10. The entire case, or the consideration of any particular question involved in it, should not be taken from the jury upon a prayer that there is no sufficient evidence to justify the finding for the adverse party, if there be any evidence from which a rational conclusion may be drawn as opposed to the theory of such prayer. *Ib.*
11. Before such a prayer can be granted, the court must assume the truth of all the evidence before the jury tending to sustain the claim or defence, as the case may be, and of all inferences of fact fairly deducible from it, as on demurrer to evidence; and this though such evidence be contradicted in every particular by the opposing evidence in the cause. *Ib.*
12. But where the evidence is of such an inconclusive nature that no rational conclusion can be fairly drawn from it in support of the claim or defence sought to be maintained by it, it is the imperative duty of the court to instruct the jury that such evidence is not sufficient to be considered by them. *Ib.*
13. Questions as to whether verdicts have been rendered against the decided weight of evidence, or in disregard of the rules of evidence, or from passion or prejudice, can only be dealt with by the court in which the trial takes place, upon motion for a new trial. *Ib.*
14. On questions of marriage, births, deaths, &c., entries in a family Bible or Testament are admissible, even without proof that they have been made by a relative, provided the book is produced from the proper custody. Proof of the handwriting or authorship of the entries is not required, when the book is shown to have been the family Bible or Testament. *Ib.*

See CONTRACT, 5; JUDGMENT, 5.

EXTRADITION.

In the absence of positive stipulation by treaty there can be no extradition. A man cannot be extradited for one crime and tried for another and different crime. *State v. Haices*, 524.

HOMESTEAD.

On a writ of entry to foreclose a mortgage of a parcel of land which contains a release of all homestead rights, it is no defence that the tenant had acquired a homestead right before the mortgage deed, and that the estate is sufficient to satisfy the mortgage, without having recourse to the homestead. *Searle v. Chapman*, 386.

HUSBAND AND WIFE.

1. A husband and wife are jointly liable for a tort done by her in his absence, but under his direction and instigation. *Handy v. Foley*, 532.
2. Evidence of acts done by a husband in the presence of his wife, similar to those done by her in his absence, in execution of the same purpose, is admissible to show that the wife acted under his direction and instigation. *Ib.*

INSURANCE.

1. A policy of life insurance which stipulates for the payment of an annual premium by the assured, with a condition to be void on non-payment, is not an insurance from year to year like a common fire policy; but the premiums constitute an annuity, the whole of which is the consideration for the entire assurance for life; and the condition is a condition subsequent, making void the policy by its non-performance. But the time of payment in such policies is material, and of the essence of the contract; and failure to pay involves an absolute forfeiture, which cannot be relieved against in equity. *New York Life Ins. Co. v. Statham*, 6.
2. If failure to pay the annual premium be caused by the intervention of war between the territories in which the insurance company and the assured respectively reside,

- which makes it unlawful for them to hold intercourse, the policy is nevertheless forfeited if the company insist on the condition ; but in such case the assured is entitled to the equitable value of the policy arising from the premiums actually paid. This equitable value is the difference between the cost of a new policy and the present value of the premiums yet to be paid on the forfeited policy when the forfeiture occurred, and may be recovered in an action at law or suit in equity. *Ib.*
3. The doctrine of revival of contracts, suspended during the war, is one based on considerations of equity and justice, and cannot be invoked to revive a contract which it would be unjust or inequitable to revive, — as where time is of the essence of the contract, or the parties cannot be made equal. The average rate of mortality is the fundamental basis of life assurance, and as this is subverted by giving to the assured the option to revive their policies or not after they have been suspended by a war (since none but the sick and dying would apply), it would be unjust to compel a revival against the company. *Ib.*
 4. A life policy is a chose in action. The sale and assignment of such a policy, outstanding and valid, and containing no prohibition of such alienation, is good in Rhode Island, though made to one who has no interest in the life insured, provided such sale and assignment is a *bonâ file* business transaction, and not a device to evade the law. *Query.* Whether in Rhode Island a person can legally take out an original policy on a life in which he has no interest ? *Clark v. Allen*, 316.
 5. The policy insured separate sums on building, fixtures, and stock, and provided that fraud on the part of the insured should cause a forfeiture of all claim under the policy. *Held*, that a fraud proved in the claim in respect of one of the subjects of insurance avoided the policy as to all, and that the policy would be avoided by fraud on the part of the insured in making the contract, without any express provision to that effect. *Moore v. Virginia Fire & Marine Ins. Co.* 369.
 6. A foreign insurance corporation which has complied with the laws of Virginia is domiciled there, and is not a citizen of another state in matters of controversy with citizens of Virginia. It must sue and be sued in the state courts, and does not come within the act of Congress relating to the removal of causes. *Continental Ins. Co. v. Kasey*, 310.

See ADMIRALTY, 8.

JUDGMENT.

1. The record of a judgment rendered in another state may be contradicted, as to the facts necessary to give the court jurisdiction ; and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist. Such want of jurisdiction may be shown either as to the subject matter, the person, or in proceedings *in rem* as to the thing. The circuit courts of that usurped government were a constituent part thereof. Their judicial proceedings, within their military lines and during the war, are not such as are, under art. 4, sec. 1, of the Constitution of the United States and the act of Congress, entitled to full faith and credit. *Pennywit v. Foote*, 97.
2. The difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action, stated. In the former case the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. *Cromwell v. County of Sac*, 242.
3. In an action against a county in Iowa upon certain interest coupons originally attached to bonds issued by the county for the erection of a court-house, it was found and determined that the bonds were void as against the county in the hands of parties who did not acquire them before maturity for value ; and, inasmuch as the plaintiff in that action had not proved that he had given such value, it was adjudged that he was not entitled to recover : *Held*, that the judgment did not estop the plaintiff holding other bonds of the same series, and other coupons attached to the same bonds as the coupons in the original action, from showing in a second action against the county that he acquired such other bonds and coupons for value before maturity. *Ib.*

4. The finding in one action that the plaintiff therein is the holder and owner of certain coupons in suit, does not estop the defendant from showing, in another action, that such plaintiff prosecuted the first action for the use and benefit of the plaintiff in the second action. The finding only establishes the fact that such plaintiff held the legal title to the coupons, which was sufficient for the purpose of the action, and was not inconsistent with an equitable and beneficial interest in another. *Ib.*
5. A judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties; but to this operation of the judgment it must appear, either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, the whole subject matter of the action will be at large and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible. *Russell v. Place*, 325.
6. In an action at law for damages for the infringement of a patent for an alleged new and useful improvement in the preparation of leather, which patent contained two claims: one for the use of fat liquor generally in the treatment of leather; and the other for a process of treating bark-tanned lamb or sheepskin, by means of a compound composed and applied in a particular manner; the declaration alleged, as the infringement complained of, that the defendants had made and used the invention, and caused others to make and use it, without averring whether such infringement consisted in the simple use of fat liquor in the treatment of leather or in the use of the process specified: *Held*, that the judgment recovered in the action does not estop the defendant in a suit in equity by the same plaintiff, for an injunction and an accounting for gains and profits, from contesting the validity of the patent, it not appearing by the record, and not being shown by extrinsic evidence, upon which claim the recovery was had; the validity of the patent was not necessarily involved, except with respect to the claim which was the basis of the recovery: a patent may be valid as to a single claim and invalid as to the others. *Ib.*
7. If upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence. *Ib.*

See BILLS AND NOTES, 8.

8. The state government, as organized and existing, in all its departments in Alabama, during the late war, was its rightful *de jure* government. Judgments and proceedings of its courts, which during that time formed a portion of that government, not violative of the Constitution and laws of the United States, or infringing upon the state Constitution, are valid and binding. *Parks, Brewer & Co. v. Coffey*, 204.
9. A sale of land under a *pluries* execution, issued since the war on a judgment rendered during the war, is valid, and will pass the title of the defendant in execution; and he not questioning the validity of the process, a third person cannot collaterally attack a sale under the execution, on the ground that *scire facias* was necessary to authorize execution. *Ib.*
10. When an *alias fi. fa.* issues, followed up, without the lapse of a term, by a *pluries* execution under which a sale is made, the purchaser's title is superior to the lien of a creditor who attached the land in the interval elapsing between the issue of the *alias fi. fa.* and sale under the *pluries* execution. *Ib.*
11. While it is well settled that the judgment of a court of general jurisdiction cannot be impeached collaterally, if it appears in a collateral proceeding that there was no citation or summons, when there should have been, the judgment will be held to be void. Plaintiff, whose wife was insane and confined in an asylum out of the state, procured a decree of divorce, without summons or citation, in pursuance of the letter of certain statutes which provided that jurisdiction could be obtained by publication. *Held*, that it was competent to show in a collateral proceeding that the decree of divorce was obtained without the wife being legally cited to answer, and that upon proof of the fact the decree would be treated as null and void. *Newcomb's Heirs v. Newcomb*, 341.

JURISDICTION.

1. Neither the constitutional provision, that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, nor the

act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered. *Pennywit v. Foote*, 97.

2. The laws of the United States are as much the law of the land in any state as state laws are; and although, in their enforcement, exclusive jurisdiction may be given to the federal courts, yet where such exclusive jurisdiction is not given, or necessarily implied, the state courts, having competent jurisdiction in other respects, may be resorted to. In such cases, the state courts do not exercise a new jurisdiction conferred upon them, but their ordinary jurisdiction derived from their constitution under the state law. *Clafin v. Houseman*, 51.

See BANKRUPTCY, 8.

LIMITATIONS.

Held, That the following: "I have received a letter from you some time ago, asking of me what I intend doing with balance of a note I owe you;" and after speaking of an arrangement to pay another creditor, "and after he is paid I will pay you all I owe you, and if I can do anything for you before that time I will do so. You need not trouble yourself about me that I will not pay you, for I expect to pay all I owe," did not constitute a new promise. *Miller v. Baschore*, 286.

MARRIAGE.

1. In a case involving the question of marriage, where there is no impediment to marriage, and the connection between the parties was illicit in its commencement, it will be presumed to continue to be of the same character; and in order to overcome that presumption it will be necessary to adduce other evidence than that of the cohabitation of the parties to establish their marriage. *Jones v. Jones*, 489.
2. If, after the birth of a person claiming to be the legitimate child of his parents, though born as a bastard, there be no cohabitation of his father and mother, the latter assuming the name of the former, and the parties treat each other as man and wife, and treat the claimant as their child, and they are treated as, and reputed to be, man and wife by their friends and acquaintances, these are facts proper to be submitted to the jury, from which marriage may be inferred, notwithstanding the original illicit connection between the parties. *Ib.*
3. The presumption of marriage will not arise from the cohabitation of a man with a woman, if during her life and without any proof of a divorce, he marries another woman. *Ib.*
4. Under the law of this state (Maryland) the marriage of a slave without the consent of the master was not actually void. *Ib.*
5. The Act of 1777, ch. 12, prohibited ministers of the gospel from publishing the banns, or celebrating matrimony between servants, or a servant and a free person, without the consent of the master. *Held*, that this act did not render the prohibited marriage void. *Ib.*

MASTER AND SERVANT.

The relation between the owner or master and pilot, as that of master and employee, is not changed by the fact that the selection of the pilot is limited to those who have been found by examination to possess the requisite knowledge and skill, and have been licensed by the government inspectors. *Sherlock v. Ailing*, 38.

MORTGAGE.

Although a mortgage of personal property to be subsequently acquired is in itself ineffectual to vest in the mortgagee a legal title to the property, yet if after acquisition by the mortgagor the mortgagee by delivery from, or by consent of, the mortgagor, takes possession of the property under the mortgage conveyance, the title to the property both in law and equity vests in the mortgagee without further conveyance or bill of sale. *Cook v. Corthell*, 301.

See ADMIRALTY, 3, 4, 5, 6; HOMESTEAD.

MUNICIPAL BONDS.

1. Where an act of the legislature authorized a city to issue its bonds in aid of a railroad company, and ratified a contract by which the city, having issued its said bonds,

agreed to appropriate sufficient moneys from its treasury to pay the accruing interest thereon, the city was thereby authorized to levy a tax to pay said interest, and such authority carried with it the duty to make the levy. *Sibley v. The City of Mobile*, 226.

2. But when at the time of the issue of the bonds the Constitution of the state limited the taxing power of the city to a certain per centum upon its taxable property, the city could not exceed that limit; but having first levied a tax sufficient to pay its current expenses, it was bound by its contract to exhaust, if necessary, the residue of its taxing power in order to pay the interest on said bonds. *Ib.*
3. Where such a constitutional limit to the taxing power existed, it was not competent for the legislature, by an act passed after the issue of said bonds, to direct that the entire taxing power of the city should be exhausted for the payment of the holders of bonds of another issue who had no specific claim upon the fund raised by taxation, or any part thereof. *Ib.*
4. Where the taxing power of the city was limited by the Constitution, all the holders of the bonds issued by the city were entitled to share *pro rata* in the general fund raised by taxation, which remained after the payment of the current expenses of the city. *Ib.*
5. A city with a limited power of taxation which, by neglect to levy and collect taxes, has permitted the interest on certain of its bonds to fall in arrears, cannot defend against an application for the writ of mandamus to compel the levy of a tax to pay a judgment recovered for interest due on bonds of a later issue, by alleging that a levy to pay the interest in arrears on the older issue would exhaust its taxing power, when at the same time it expresses no purpose to levy a tax for that object. *Ib.*
6. Actions were brought upon certain bonds issued by plaintiffs in error, the town of Ottawa and Kendall County. Evidence was offered in the court below that the statutes in pursuance of which the bonds had been issued, had not been passed in the exact form and manner prescribed by the state Constitution. The testimony was excluded, the court holding that the facts showed that the holder of the bonds was a *bonâ fide* purchaser without notice of any objection to their validity; that the first instalment of interest had been paid at maturity; that the law had been duly published among the printed statutes of the state; and that the defendant was, therefore, estopped from offering any evidence that the law was not passed according to the provisions of the Constitution. *Held*, that this view was erroneous; that there can be no estoppel in the way of ascertaining the existence of a law; and that as, under the decisions of the state court of last resort, the evidence was admissible to prove that the law as published was not a law, it should have been received. *Town of Ottawa v. Perkins*, 193.
7. Any failure to comply with the provisions of law touching the issue of a municipal bond will render it invalid. And this rule is to be applied to detached coupons which refer on their face to the bonds. *McClure v. Township of Oxford*, 241.

See JUDGMENT, 2, 3, 4.

MUNICIPAL CORPORATION.

1. The owner of a wooden building, situated in a city which has, by ordinance, prohibited the erection or placing a wooden structure over ten feet high within certain prescribed boundaries, which building was erected within said limits prior to the passage of the ordinance, may lawfully move such building from one lot to another within the prescribed boundaries. *City of Cleveland v. Lenze*, 68.
2. The owner of such building having, by the consent of the city, moved it along and upon a street to a point adjoining his lot, located within the fire boundaries, may lawfully place it upon such lot, and the city could not lawfully interfere to prevent his doing so. *Ib.*
3. Under circumstances that place the city in the wrong, an interference on her part so that the owner is prevented from placing the building on his lot, and in consequence, by obstructing the street, the building becomes a nuisance and is torn down, the city is liable to the owner for damages. *Ib.*
4. Where the building was lawfully in the street, and the owner was in the act of removing it from the street upon his own premises, and by the wrongful interference of the city with the rights of the owner, the building becomes a nuisance, an order from the police court, requiring it to be removed or torn down, will not exempt the city from liability for damages. *Ib.*
5. An agreement between the owner of such building and the city authority, made on the consideration that the city will permit him to tear down his own building, or that

the city may tear it down without incurring a responsibility in damages, is wanting in mutuality, without consideration, and void. *Ib.*

6. The owner of such building having offered to make it conform in all respects to the requirements of the fire ordinance of May 10, 1854, had the right to do so, and was entitled to a reasonable time in which to perform. *Ib.*
7. The statutes of Indiana permit municipal corporations to make donations and subscriptions to the capital stock of railroad corporations, and to issue bonds accordingly. The city of Attica issued certain bonds in consideration of the location of the shops of a railroad company within the limits of the city. *Held*, that the bonds were illegally issued. *Indiana North & South Railroad Co. v. City of Attica*, 377. †

NATIONAL BANK.

Whether due care and diligence have been exercised by a bank in the custody of bonds deposited with it as collateral security is a question of fact exclusively within the province of the jury to decide. *Third National Bank of Baltimore v. Boyd*, 214.

NEGLIGENCE.

1. The terms negligence and ordinary care are correlative terms. Ordinary care depends on the circumstances of the particular case, and is such care as a person of ordinary prudence under the circumstances would have exercised. *Norfolk & Petersburg R. R. Co. v. Ormsby*, 117.
2. A railroad company running its cars through a populous street of a city, on which many children live, must omit nothing which can be done by the company and its agents to prevent injury to children on the street. *Ib.*
3. A child two years and ten months old cannot be capable of contributory negligence, so as to relieve a railroad company from liability for its own negligence. *Ib.*
4. Negligence of the parent or guardian of an infant child injured by a railroad car cannot constitute contributory negligence on the part of the child, so as to exonerate the company. *Ib.*
5. Whether it is due and proper care to attempt to remove a person from a street railroad car, while the same is in motion, is a question of fact for the jury, and not of law for the court. *Healey v. The City Passenger Railroad Co.* 249.
6. If the driver of such car has authority to collect fare, and to put a person off for its non-payment, his master will be liable, if injury results from excessive force and violence in so doing, or if, as driver, he is guilty of carelessness or negligence in keeping the car in motion, by reason of which the person is run over and injured. *Ib.*
7. Where the evidence of the plaintiff tends to show want of care on the part of the driver of a street car in keeping the car in motion, while he is putting a person off for non-payment of fare, by reason of which the person is run over by the car and injured, it is error, in such case, to instruct the jury that the liability of the railroad company depends solely on the question whether the driver acted within the scope of his employment in attempting to collect fare, and in putting the person off for refusal to pay. *Ib.*
8. Where the injury complained of results from want of care in the driver in running of the car, and not from the force and violence used in ejecting a person from the car, the company would be liable, whether the driver had or had not authority to collect fare. *Ib.*

See COMMON CARRIER, 3, 4; CONSTRUCTION OF STATUTES; RAILROAD, 1, 4, 5; RESPONDEAT SUPERIOR.

PARTNERSHIP.

1. One of the members of an insolvent firm cannot, either before or after dissolution of the partnership, make a valid assignment of all its effects for the benefit of creditors, against the will of a copartner, or without his assent when he is present or accessible. *Holland v. Drake*, 479.
2. Where an assignment is so made against the will of the non-executing partner, or when he is present and not assenting, and he subsequently ratifies the assignment, the ratification will relate back to the time of executing the assignment, and give it effect from that date; but not so as to defeat the rights of third persons, acquired in good faith in the mean time. *Ib.*
3. Where in such a case an attachment had been levied upon the property, between the date of the assignment and its ratification, and by agreement between the attaching

creditor, the assignee, and the partners, the property was delivered by the sheriff to the assignee, to be by him sold in place of the sheriff, and the proceeds to stand in place of the property, and be applied to the attaching creditor's judgment when obtained, if the court should hold the attachment good; in an action by the attaching creditor against the assignee and the partners, to have the proceeds of the property so applied: *Held*, that the defendants were estopped from setting up as a defence that the lien of the attachment was lost by delivery of the property to the assignee under said agreement. *Ib.*

4. In such action it was not necessary to make the partnership creditors parties defendant. *Ib.*
5. The outgoing members of a firm that is dissolved, are sureties on a partnership debt for those who remain, but they are discharged if the latter, without their knowledge or consent, substitute a new debt that increases their liability. *Smith v. Sheldon*, 93.

PATENT.

1. The formal expression, "as shown and described," is not to be taken to limit a claim to the exact construction shown and described. Hence where the claim of the patent was for "a plug of tobacco having a hard label pressed into one of its faces as specified," the description setting forth that the label was to be applied *underneath* the wrapper, and it appeared that defendant applied his label *outside of* the wrapper, it was held that the claim was infringed and a preliminary injunction was granted. *Lorillard & Co. v. McDowell*, 163.
2. Mere change of material does not constitute invention. But where the result of the substitution of one material for another is a superior product, — one having new capabilities and functions, — the substitution amounts to invention. *Hotchkiss v. Greenwood*, and analogous cases expounded. *Smith v. Goodyear Dental Vulcanite Co.* 74.
3. To show want of novelty in an invention the proofs must establish a prior use of that which is in substance the same as the thing patented. *Ib.*
4. Mere amplification of an original specification will not invalidate a reissue. *Ib.*
5. A delay of nine years in pressing an application held not to be abandonment. *Ib.*

See JUDGMENT, 6.

PLEADING AND PRACTICE.

1. In a suit against a refiner and vendor of petroleum, for the death of plaintiff's husband, alleged to have been caused by the explosion of the oil, the allegation and evidence of plaintiff were that the oil exploded in a lamp in his hand whilst he was walking quietly; the defendant's allegation and evidence were that the death was caused by his tripping and falling with the lamp in his hand. In charging, the court said, "Was the death occasioned by the explosion at the time and in the manner claimed by the plaintiff? In regard to this there can be no doubt whatever." *Held* to be error; whether the death was caused by the explosion as alleged by the plaintiff was for the jury. *Elkins, Bly & Co. v. McKean*, 30.
2. The declaration averred that the defendants wilfully sold the oil for lighting purposes, "knowing that it was highly inflammable, explosive, and unsafe," &c. There was evidence that the oil had been sold by defendants, but none that the sale was with wilful knowledge of its dangerous character. *Held* to be error to submit the case to the jury. *Ib.*
3. It is error for the presiding justice to permit counsel, in addressing the jury, against seasonable interposition, to proceed with his argument upon asserted facts not in evidence and having no legitimate pertinency to the issue. *Rolfe v. Inhabitants of Rumford*, 461.
4. In a proceeding to confiscate property of a person charged to be in rebellion, the directions of the attorney general are, that the method of seizure of the property shall be conformed as nearly as may be to the state law, if there be such. When therefore the proceeding is to confiscate debts due from a municipal corporation, the notice to the debtor must be upon the mayor or other officer named in the Virginia statute; and notice given to the auditor of the corporation is of no effect, and the judgment based upon such notice is null and void. *Fairfax v. City of Alexandria*, 512.
5. On such a proceeding against F., the counsel of F. does not enter an appearance for him because in three cases against the same party, before the same judge, he was informed by the judge from the bench, that it was the rule of his court not to allow an appearance and defence by rebels and traitors; and in these cases the appearance and

defence were stricken from the cases; and this a short time before the last case was acted on. The counsel was not in default for failing to enter an appearance for F.; and the decree of confiscation is void and of no effect. *Ib.*

PRINCIPAL AND SURETY.

1. The right of contribution among co-sureties is not founded in contract, and does not depend on the form of the instrument nor the position of the names of the obligors therein, but is the result of the application of general principles of equity, and depends on the actual relation they sustain to the instrument and to each other. In an action for contribution, and in the absence of any contract in writing fixing such relation and liability between accommodation parties to a note, parol evidence is admissible to show the real nature of the transaction. *Oldham v. Broom*, 263.
2. As between accommodation makers of a promissory note, the presumption is that they are co-sureties, and as such liable to each other to contribute; but this presumption may be rebutted by parol proof showing that the one last signing did so as the surety for the prior makers, and not as a co-surety with the prior surety. *Ib.*
3. Where a joint note is signed by the principal and by one as his surety, and is intrusted by the surety to the principal without limit on his authority, such surety thereby impliedly authorizes the principal to obtain such additional sureties or guarantors as may be required to make the paper available for the purposes intended by the original makers, and the sureties or guarantors so obtained may stipulate the terms of their liability, as between themselves and prior parties. *Ib.*
4. One who thus signs such note, at the request of the principal debtor, to enable him to use it as intended, without the knowledge of the prior surety, and without any agreement or understanding with him to the contrary, may stipulate with the principal debtor and make it a condition of his signing that he signs as surety of the prior parties, and not as co-surety with the prior surety. *Ib.*
5. Such stipulation need not be in writing, and parol evidence is admissible to show an express contract to that effect, or facts and circumstances that will raise an implied contract. *Ib.*
6. Declarations of such party, made to the principal debtor at the time he executes and delivers the instrument, as to the terms and conditions on which he becomes liable, are, in connection with other testimony, admissible as part of the *res gestæ*, tending to show an agreement, express or implied, as to the extent of such liability. *Ib.*

PUBLIC USE.

1. The franchises and property of one railroad may be taken for the construction of another in all cases where the property of an individual might be, upon making compensation therefor; but not without. *Grand Rapids, Newaygo & Lake Shore R. R. Co. v. Grand Rapids & Indiana R. R. Co.* 158.
2. Property taken for a particular public use does not thereby become public for all purposes; it may revert when the specific public easement is vacated. *Ib.*
3. The term "public use," as employed in proceedings for the taking of property *in invitum*, criticised as misleading, and limited accordingly. *Ib.*

RAILROAD.

1. A railroad company is not liable for an injury to a person resulting from its failure to exercise ordinary skill and care in the erection or maintenance of its station-house, where, at the time of receiving the injury, such person was at such station-house by mere permission and sufferance, and not for the purpose of transacting any business with the company or its agents, or on any business connected with the operation of the road. *Pittsburg, Ft. Wayne & Chicago Railway Co. v. Bingham*, 468.
2. The statute requiring railroad corporations to inclose the land taken for their road with fences is a police regulation, designed to secure the safety of the public travel and transportation, and is obligatory, as such, upon all railroad corporations, whether chartered before or after its passage. *Wilder v. Maine Central Railroad Co.* 45.
3. A parol agreement between a railroad company and an adjoining owner, for the removal and discontinuance of a fence on the line of the railroad, does not run with the land, and cannot therefore bind his grantee. *Ib.*
4. Where a horse escaped from his owner's land on to an adjoining railroad and was killed by the railroad company's locomotive: *Held*, that the mere fact of his turning his horse upon his land where there was no fence between it and the railroad, was not proof of contributive negligence. *Ib.*

5. By St. 1874, c. 55, the Old Colony Railroad Company was authorized to purchase the rights, franchise, and property of the Middleborough and Taunton Railroad Corporation, and the latter was authorized to convey to the former its franchises and property, rights, easements, privileges, and powers, and thereupon the former corporation was to "be subject to all the duties, liabilities, obligations, and restrictions to which said last named corporation may be subject." *Held*, that the Old Colony Railroad Company, upon the completion of the purchase and conveyance, became directly liable in an action of tort for damage occasioned by the prior neglect of the Middleborough and Taunton Railroad Corporation. *New Bedford Railroad Co. v. Old Colony Railroad Co.* 129.
6. Damages assessed by the proper board for land taken by a railroad corporation are in full, and it is not open to the land-owner to prove that certain other causes of damage were not considered. *Perley v. B., C. & M. R. R. Co.* 464.
7. The land-owner is not to be prevented from the reasonable and prudent use of his land by reason of the improper construction of the railroad; and if, using his land in a reasonable and prudent manner, he suffers damage from such improper construction, he may recover his damages, notwithstanding such use of his land was subsequent to the construction of the railroad. *Ib.*

RECEIVER.

A court of equity has power in a proper case to allow the issuing by a receiver of negotiable certificates of indebtedness creating a first lien upon the property in his hands. *Meyer v. Johnston*, 140.

REMOVAL OF CAUSES.

1. The Act of March 3, 1875, concerning the removal of causes, warrants a removal in all cases where there are real parties in interest who are citizens of different states upon different sides. It is not necessary that all the parties on one side and all the parties on the other be citizens of different states. *Girardey v. Moore*, 387.
2. The third subdivision of section 639 of the Revised Statutes of the United States is not repealed by the Act of March 3, 1875. *Cooke v. Ford*, 280.
3. The words "final hearing or trial," in the Act of Congress of 1867, prescribing the conditions touching the removal of causes, require the application for removal to be made before "trial" in actions at law and before "final hearing" in suits in equity. Such application will not be allowed after the applicant has elected to stand a trial in the state court, if such trial is not final. *Continental Ins. Co. v. Kasey*, 310.

RESPONDEAT SUPERIOR.

1. One who employs a firm of collecting agents, in response to an advertising card, in which they announce that they will treat his debtors "with delicacy, so as not to offend them, or with such severity as to show that no trifling is intended," giving no special instructions, authorizes them to use such means as they see fit to adopt, in the prosecution of his business for his benefit, and is responsible therefor. *Caswell v. Cross*, 289.
2. Plaintiff was in the employ of a contractor engaged by defendants to make excavations in a tunnel. Trains were constantly passing the spot, which was on a curve and dark. No one was stationed to give an alarm, although precautions had been previously taken to protect other workmen similarly employed. Plaintiff was struck by a train and injured. *Held*, that defendants were not liable. *Woodley v. Metropolitan Railway Co.* 452.

SLANDER.

The words, "A. B. stole windows from C. D.'s house," are not of themselves, in their ordinary and popular sense, actionable, as imputing either a charge of larceny or an act of malicious mischief upon real estate. *Wing v. Wing*, 240.

STATUTE OF FRAUDS.

See CONTRACT, 3, 4.

SUNDAY.

A loan of money made on the Lord's day is void. Whether the promise to repay be in writing, verbal, or implied, it cannot be enforced. *Meador v. White*, 238.

TAXATION.

It is not competent to provide by law that sewer taxes shall be assessed upon lots and lands benefited according to their superficial area. If such an assessment was lawful there would be ground for a bill in equity to remove a cloud upon title. *Thomas v. Gain*, 1.

See MUNICIPAL BONDS, 1, 2, 3, 4, 5.

TRADE-MARK.

1. The numerical symbol $\frac{1}{2}$, printed in large, bold, red characters, in a certain form and style, had been used since 1873 by the complainant as one of his trade-marks on the packages and boxes of certain classes of cigarettes manufactured by him, and was registered in the United States Patent Office in June, 1875. This symbol was originally employed to indicate the idea that the cigarettes were composed of two kinds of tobacco in the proportion of half and half; but except so far as it *indicates* this idea, which it does not really *express*, it is a merely arbitrary device. On a bill brought to enjoin against another's use of this symbol: *Held*, that the complainant had not a right to the exclusive use of the numerical character $\frac{1}{2}$, written in any ordinary manner; but that he had a right to the exclusive use of it in the particular form, size, color, and style in which he had used and registered it. *Kinney v. Allen & Co.* 258.
2. Plaintiff, a manufacturing company, had long applied its corporate name, "The Amoskeag Manufacturing Company," to numerous kinds of cotton goods, which were widely known as "Amoskeag" goods, but had never made "prints." Defendant used the word "Amoskeag" on prints: *Held*, that plaintiff was entitled to an injunction restraining defendant from such use of its corporate name. *Amoskeag Manufacturing Co. v. Garner*, 176.

TROVER.

The plaintiff employed one M. to buy a horse for him. M. bought the horse, paying for it with the plaintiff's money and took a bill of sale in his own name. Afterwards he informed the plaintiff of what he had done, and showed him the bill of sale; but the plaintiff permitted him to go away with the horse and bill of sale still in his possession. M. thereupon went to the defendant, who had no knowledge of the agency, showed him the bill of sale, sold him the horse for cash, and absconded. *Held*, that the plaintiff could not recover in an action of trover for the horse. *Nixon v. Brown*, 187.

USURY.

1. Where a commission merchant in Baltimore advanced to a pork packer in Peoria \$100,000, for which he was to receive interest at the rate of ten per cent. per annum, and a fixed commission for the sale of the product, to be paid whether it was sold by the commission merchant or not, it was properly left to the jury to decide, on all the facts, whether or not the commissions were a cover for usury, or were an honest contract for commission business in connection with use of money. The express agreement of ten per cent. is not usurious, because lawful in Illinois, though not so in Maryland. *Cockle v. Flack*, 184.
2. The *lex loci contractus* determines the nature, validity, and construction of contracts; the *lex fori* determines the remedies for their enforcement. In order to render a contract void for usury, it must be tainted with that offence in its inception. The contracts and mortgage in this case, not being usurious in their origin, did not become "illegal and void" under the usury law of New Brunswick, where they were executed, by the receipt of usurious interest thereon. *Lindsay v. Hill*, 319.

WILL.

1. The burden of proof is on a party, seeking to establish a lost will by parol evidence of its contents, to prove the contents by evidence strong, positive, and free from doubt. *Newell v. Homer*, 88.
2. If a will, once known to exist, is not found at the death of the testator, it is presumed to have been revoked. *Ib.*
3. On an appeal from a decree of the judge of probate refusing to approve and allow an instrument alleged to be a copy of a will, the original being alleged to be lost, sup-

pressed, or destroyed since the death of the testator, issues were framed for the jury, covering these questions. *Held*, that an issue proposed by the appellant, and which the judge who tried the case refused to submit to the jury, as to specific parts of the alleged will, was immaterial. *Ib.*

4. If this court has power, on a probate appeal, to revise the discretion of the judge presiding at the trial of issues of fact before a jury, in refusing to grant a delay in the trial on account of the absence of a witness, no affidavit of the testimony expected nor any statement of the grounds of such expectation having been made, it will only do so where the circumstances connected with the absence of the witness, and his alleged relation to the case, are so peculiar as to require that the ordinary rule should be dispensed with. *Ib.*
5. To establish by copy a will alleged to have been destroyed or suppressed by parties having an adverse interest thereto, evidence of a conspiracy by such parties to suppress the will is immaterial, unless accompanied with evidence sufficient to justify a jury in finding the execution and contents of the will, and its loss since the testator's death. *Ib.*

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NOTES OF OPINIONS, DECISIONS, AND ORDERS

OF THE

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1876.

Monday, November 13, 1876.

No. 82. *James A. Lovejoy et al., plaintiffs in error, v. Carroll C. Spofford et al.* In error to the Circuit Court of the United States for the District of Minnesota. Mr. Justice Hunt delivered the opinion of the court, reversing the judgment of the said circuit court, with costs, and remanding the cause, with directions to award a new trial.

In this case it is held that to discharge a member of a firm from the claim of one who has had no dealing with it prior to its dissolution, but who knew of its existence, and who were its members, it is not necessary that either actual notice or public notice in a newspaper be shown, but only that the notice of dissolution was so generally communicated to the business men of the vicinity as to be likely to come to the knowledge of all, and a judgment, based on a refusal to charge the jury that if such notice was given the jury were at liberty to infer knowledge, is reversed.

No. 48. *Horace B. Clafin, plaintiff in error, v. Julius Houseman, assignee, &c.* In error to the Supreme Court of the State of New York. Mr. Justice Bradley delivered the opinion of the court, affirming the judgment of the said supreme court, with costs.

In this case the court affirm a judgment recovered against the plaintiff in error by the assignee in bankruptcy in the state court for the amount of a judgment obtained by him against bankrupts four months prior to the commencement of proceedings in bankruptcy, holding that an assignee in bankruptcy, under the Act of 1867, as it stood before the revision, had authority to bring suit in the state courts wherever these courts are invested with appropriate jurisdiction suited to the nature of the case.

No. 61. *The United States, plaintiff in error, v. Bernard Lariviere et al.* In error to the Circuit Court of the United States for the District of Minnesota. Mr. Justice Davis delivered the opinion of the court, reversing the judgment of the said circuit court, and remanding the cause with directions to overrule the demurrer and to proceed in accordance with law and justice.

The defendants in error in this case were indicted for selling liquor in the Indian country. As it appeared that the territory where the offence was committed was a portion of the State of Minnesota, the court below sustained a demurrer to the indictment, holding that the effect of the admission of Minnesota into the Union was to withdraw this territory from the Indian country. It is here said that as the prohibition was extended to the lands when ceded by the Indians to the United States, the provisions of the treaty still apply to them. The fact that the ceded territory is within the limits of Minnesota is a mere incident and not the foundation of the prohibition. The act of Congress, imported into the treaty, applies alike to all Indian tribes occupying a particular country, whether within or without the state lines, and, as it is based exclusively on the federal authority over the subject matter, there is no disturbance of the principle of

state equality. The power to make treaties with the Indian tribes, it is said, is coextensive with the power to make treaties with foreign nations.

No. 53. *Michael O'Hara et al., appellants, v. John G. MacConnell et al., assignees.* Appeal from the Circuit Court of the United States for the Western District of Pennsylvania. Mr. Justice Miller delivered the opinion of the court, reversing the original decree of the said circuit court, with costs, and remanding the cause for further proceedings in accordance with law and justice.

In this case the court reversed the decree below, holding that it was the duty of the court, when the bill on its face showed that the party whose interest was the principal one to be affected by the decree was both a minor and a *femme covert*, and that no one appeared for her in any manner to protect her interest, to have appointed a guardian *ad litem* for that purpose. If neither her husband nor he who is styled her guardian in the bill appeared to defend her interest, it was the more imperative that the court should have appointed some one to do so; also, that if Mrs. O'Hara had been under no disabilities, it was error to have taken the bill for confessed, for want of appearance on the return day of the writ.

No. 43. *Samuel J. Sherman, plaintiff in error, v. D. S. D. Buick.* In error to the Supreme Court of the State of California. Mr. Justice Miller delivered the opinion of the court, reversing the judgment of the said supreme court, with costs, and remanding the cause with instructions to order a new trial, in conformity with the opinion of this court.

In this case the court reversed a judgment below sustaining the claim of the defendant to land in California, under a patent from the state, and upholds a patent from the United States to the plaintiff for such lands, holding that the state patent was issued without authority; as the grant from the United States to the state provided that when the grant covered lands which had been taken up by private parties the state should select other lands in lieu thereof, and finding that the plaintiff had settled upon the lands and ever since remained in possession. Mr. Justice Field did not sit in this cause, and took no part in its decision.

No. 297. *Charles Kerrison, assignee, &c. appellant, v. A. T. Stewart & Co.* Appeal from the Circuit Court of the United States for the District of South Carolina. Mr. Chief Justice Waite delivered the opinion of the court, affirming the decree of the said circuit court, with costs.

In this cause the rule is announced that under some circumstances a trustee may represent his beneficiaries in all things relating to their common interest in the trust property. He may be invested with such powers and subjected to such obligations that those for whom he holds will be bound by what is done against him, as well as by what is done by him. The difficulty lies in ascertaining whether he occupies such a position, not in determining its effect if he does. If he has been made such a representative, it is well settled that his beneficiaries are not necessary parties to a suit by him against a stranger to enforce the trust, or to one by a stranger against him to defeat it in whole or in part. In such cases the trustee is in court for and on behalf of the beneficiaries, and they, though not parties, are bound by the judgment unless it is impeached for fraud or collusion between him and the adverse party.

Monday, November 20, 1876.

No. 69. *The Home Insurance Co., plaintiff in error, v. The Baltimore Warehouse Co.* In error to the Circuit Court of the United States for the District of Maryland. Mr. Justice Strong delivered the opinion of the court, affirming the judgment of the said circuit court, with costs and interest.

In this case it is held that a policy of insurance taken out by warehouse-keepers against loss, &c., on "merchandise, their own or held by them in trust, or in which they have an interest or liability," contained in a designated warehouse, covers the merchandise itself, and not merely the interest or claim of warehouse-keepers. If the merchandise be destroyed by fire the assured may recover the entire value of the goods not exceeding the sum insured, holding the remainder of the amount, after satisfying their own loss, as trustees for the owners. In such a case, where the warehousemen and the depositors take out policies covering the same goods, the second policies constitute double insurance, and they bear a loss proportionately. In a case of contributing policies, adjustment of loss made by an expert may be submitted to the jury, not as evidence of the facts therein or as obligatory, but for the purpose of assisting the jury

in calculating the amount of liability of the insurer upon the several hypotheses of facts maintained in the adjustments if they find either hypothesis correct. No part of a letter written as an offer of compromise is admissible in evidence.

No. 652. *Charles Morgan, plaintiff in error, v. The State of Louisiana.* In error to the Supreme Court of the State of Louisiana. Mr. Justice Field delivered the opinion of the court, affirming the judgment of the said supreme court, with costs.

The plaintiff in error claimed that certain property of the New Orleans, Opelousas & Great Western Railroad Company, which had come into his hands by purchase at a mortgage sale and at a sheriff's sale, was exempt from taxation as his property, because it was exempt by law while the property of the company. The court hold that only a franchise of a railroad company, which is defined as a right or privilege essential to the operations of the corporation, — such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like, — may be conveyed to a purchaser of the road as part of the property of the company; that immunity from taxation is not one of these positive rights or privileges essential to the working of the road, but is personal in its character and incapable of transfer without express statutory direction.

No. 75. *James Hendricks, plaintiff in error, v. A. G. Lindsay et al.* In error to the Circuit Court of the United States for the Northern District of New York. Mr. Justice Davis delivered the opinion of the court, affirming the judgment of the said circuit court, with costs and interest. This cause involved only questions of fact.

No. 88. *Alfred E. and Chas. E. Tilton, appellants, v. Jos. B. Cofield et al.* Appeal from the supreme court of the Territory of Colorado. Mr. Justice Swayne delivered the opinion of the court, reversing the decree of the said supreme court, with costs, and remanding the cause with directions to dismiss the bill. In this cause the court rules that the facts do not show such fraud as to sustain the bill.

No. 47. *The Steamboat Atlas, &c. appellants, v. The Phoenix Insurance Co.* Appeal from the Circuit Court of the United States for the Eastern District of New York. Mr. Justice Clifford delivered the opinion of the court, reversing the decree of the said circuit court, with costs, and remanding the cause with directions to reverse the decree of the district court, and to enter a new decree in favor of the libellants for the entire damages ascertained by the commissioner.

It appeared from the record in this cause that the libellants became the insurers of the cargo of the canal-boat named in the libel, consisting of linseed, in the sum of fourteen thousand five hundred dollars, for a voyage from the port of New York to the port of New Brunswick, in the State of New Jersey; that the canal-boat, with her cargo on board, was taken in tow at the port of departure by the steam-tug called *The Kate*; that the steam-tug with her tow, including the canal-boat and two other vessels, proceeded in safety to New Brighton, where the whole flotilla remained until the next morning, when they started for the port of destination, the steam-tug heading northwest-by-north, and taking her course across the kills directly for Port Johnson, on the Jersey shore; that the steam-tug with the canal-boat and the two other vessels in tow kept that course until she was within one hundred and fifty yards of the shore, when the master, being then in the pilot-house, heard the whistle of a steamboat about one tenth of a mile distant; that it was a single blast, being the signal that the respective boats as they approached should pass to port; that the master of the steam-tug having the canal-boat in tow answered the signal by blowing his whistle twice, which is the proper signal that the boats should pass to starboard, it being unsafe for him, owing to the state of the tide and the conformation of the adjacent shore, to attempt to pass the approaching vessel on the port side; that the signal given was the proper one; and the charge is that the master of the steam-tug immediately starboarded his helm and that the approaching vessel, which proved to be the steam-tug *The Atlas*, within a minute ran into the steam-tug having the canal-boat in tow, with great force and violence, staving her in from her plank-shear to the third plank below her water line, which caused the steam-tug and canal-boat she had in tow to sink, whereby the cargo of the canal-boat became a total loss. It was decreed below that the libellants should recover one half the damages. This decree is here reversed, the court holding that the decree should have been for the entire amount of damages as ascertained by the master.

No. 122. *H. W. Shacker, plaintiff in error, v. The Hartford Fire Insurance Co.* In error to the Circuit Court of the United States for the Northern District of Illinois. Mr. Chief Justice Waite delivered the opinion of the court, dismissing the writ of error in this cause for the want of jurisdiction.

No. 103. *Geo. M. Wheeler, plaintiff in error, v. John Sedgwick, assignee, &c.* In error to the Circuit Court of the United States for the Southern District of New York. Mr. Chief Justice Waite delivered the opinion of the court, affirming the judgment of the said circuit court, with costs.

No. 89. *Frank H. Fisher, appellant, v. R. R. & Jos. Craig.* Mr. Chief Justice Waite announced the decision of the court, continuing this cause and ordering it for reargument at the next term.

No. 938 of '75. *The Selma & Meridian Railroad Co., appellant, v. The Louisiana National Bank of New Orleans.* Mr. Chief Justice Waite announced the decision of the court, denying the motion to rescind the other docketing and dismissing this cause, and for leave to docket same, the appellant having failed to comply with the established rules of practice of the court.

Monday, November 27, 1876.

No. 86. *Henry A. Grant, collector, &c. plaintiff in error, v. The Hartford & New Haven Railroad Co.* In error to the Circuit Court of the United States for the District of Connecticut. Mr. Justice Bradley delivered the opinion of the court, affirming the judgment of the said circuit court, with costs.

In this case the court holds that the expression, "profits used in construction," within the meaning of the one hundred and twenty-second section of the Internal Revenue Act, does not embrace earnings expended in repairs for keeping the property up to its normal condition, but has reference to new constructions adding to the permanent value of the capital, and when these are made to take the place of prior structures, it includes only the increased value of the new over the old when in good repair.

No. 76. *The President, &c. of the Bank of Kentucky, plaintiffs in error, v. The Adams Express Co.*; No. 77. *The Planters' National Bank of Louisville, plaintiffs in error, v. The Adams Express Co.* In error to the Circuit Court of the United States for the District of Kentucky. Mr. Justice Strong delivered the opinion of the court, reversing the judgment of the said circuit court, with costs, and remanding the causes with directions to award a *venire facias de novo*.

In these cases the court holds that the restriction in the bill of lading of the express company, providing that the company should not be liable for any loss, damage, or detention of a money package, occasioned by fire, does not protect the company against liability where the loss is the consequence of the negligence of carriers or their servants or agents, and, therefore, that the company is responsible for losses in such cases by fire caused by the negligence of the railroad companies employed by it in the transportation of the package. The railroad company, it is said, in transporting the messenger of the express company, and the express matter in his charge, is the agent of the express company, — employed and paid by it; the service performed is the service of the express company, — a duty incumbent upon the express company and upon no one else. If any one is to be affected by the acts or omissions of persons employed to do a particular service, it must be the one who gave the employment.

No. 63. *John S. Shaw, appellant, v. The United States.* Appeal from the Court of Claims. Mr. Justice Field delivered the opinion of the court, affirming the judgment of the said court of claims in this cause. Mr. Justice Strong took no part in the decision of this case. Dissenting, Mr. Justice Miller.

This was an action to recover for the loss of a vessel while in government service, the claim being that it had been impressed. It is held that, whatever the force or coercion may have been which attended the original entry of the vessel into the service, the transaction ultimately ended in a contract of affreightment upon the terms stated by the assistant quartermaster; and that, as charterers of the vessel under such a contract, the United States are not liable to the claimant for its loss, and of course could not be to the insurance companies which were subrogated to his rights.

No. 91. *The Mutual Life Insurance Co. of New York, plaintiff in error, v. Anna M. Snyder*; No. 92. *The Mutual Life Insurance Co. of New York, plaintiff in error, v. Lewis W. Snyder.* In error to the Circuit Court of the United States for the Eastern District of Pennsylvania. Mr. Justice Davis delivered the opinion of the court, affirming the judgments of the said circuit court in these causes, with costs and interest.

In these cases the insured, when asked how long since he was attended by a physician, answered, "Not for twenty years," when in fact he had recently fallen and sustained an injury for which he had been attended by a physician, as shown upon the trial. But, except as to this occasion, he had not been attended. The court instructed the jury that

if he was seriously hurt by the fall there could be no recovery. The verdict was for the insured, as there was no exception to this instruction. The judgment is affirmed, the court remarking that the chances of defeating the action were increased by it instead of lessened.

No. 87. *Charles W. Hornor, plaintiff in error, v. George C. Henning et al.* In error to the Supreme Court of the District of Columbia. Mr. Justice Miller delivered the opinion of the court, affirming the judgment of the said supreme court, with costs.

In this case it is held that the act of Congress making the trustees of corporations liable to the creditors of the corporation personally where they knowingly assent to an increase of its indebtedness beyond the amount of its capital stock, was intended to make the trustees liable as for a breach of trust, and that this liability constitutes a fund for the benefit of all the creditors in proportion to the amount of their debts, so far as necessary to pay them, and that, therefore, one creditor cannot be allowed to sue on his claim to the exclusion of others.

No. 93. *Stephen Talty, plaintiff in error, v. The Freedman's Savings & Trust Co.* In error to the Supreme Court of the District of Columbia. Mr. Justice Swayne delivered the opinion of the court, affirming the judgment of the said supreme court in this cause, with costs. This cause involved a question arising under the laws of the District of Columbia, of local interest only.

No. 94. *Wm. H. Whiteside et al., appellants, v. The United States.* Appeal from the Court of Claims. Mr. Justice Clifford delivered the opinion of the court, affirming the judgment of the said court of claims in this cause. This case arose under the Captured and Abandoned Property Act. The court of claims found that the seizure was made by an unauthorized agent, and this court affirms the judgment below.

No. 58. *The Town of South Ottawa, plaintiff in error, v. Noah C. Perkins*; No. 59. *The Board of Supervisors of Kendall County, plaintiff in error, v. Augustus T. Post.* In error to the Circuit Court of the United States for the Northern District of Illinois. Mr. Chief Justice Waite delivered the opinion of the court, affirming the judgments of the said circuit court in these causes, with costs and interest.

In these cases the court affirm the validity of certain municipal bonds issued in aid of certain railroad companies, and also affirm the ruling below, by which the corporations which had issued their bonds under a certain act were denied the right to offer evidence to show that the law had never in fact been passed. The chief justice delivered the opinion, holding that such a corporation, having issued its bonds and put them on the market as commercial paper upon the faith of a certain law, cannot be permitted to show, as against a *bonâ fide* holder of the bonds, that the law was never enacted; and adds that as the courts of Illinois have never decided the question directly, this court is left free to answer it. Dissenting, Justices Bradley, Miller, Davis, and Field.

No. 11 (original). *Ex parte John Henderson, petitioner*; No. 12. *Ex parte Otto H. Karstendick, petitioner.* Mr. Chief Justice Waite delivered the opinion of the court, denying the petitions for *habeas corpus* in these causes. In these motions for *habeas corpus*, seeking to take the applicants out of prison in West Virginia, on the ground that they were convicted in Louisiana, and that West Virginia had never consented to the use of her prisons for the confinement of federal prisoners, writs are denied, the court holding that neither position is tenable. The parties were convicted of a conspiracy to defraud the government of the tax on whiskey.

No. 417. *John L. Davies, plaintiff in error, v. Alfred Slidell et al.*; No. 435. *F. Huppenbauer, plaintiff in error, v. Alfred Slidell et al.*; No. 668. *Josephine Hale Ames, wife, &c. plaintiff in error, v. Heirs of John Slidell, deceased*; No. 669. *Josephine Hale Ames, wife, &c. plaintiff in error, v. Heirs of John Slidell, deceased.* In error to the Supreme Court of the State of Louisiana. Mr. Chief Justice Waite announced the decision of the court, affirming the judgments of the said supreme court, upon the authority of *Bigelow v. Forest*, 9 Wall. 339, and other cases.

No. 791. *H. H. Easterling et al., plaintiffs in error, v. The State of South Carolina, ex rel. C. E. Lartigue.* In error to the Supreme Court of the State of South Carolina. Mr. Chief Justice Waite announced the decision of the court, affirming the judgment of the said supreme court in this cause, with costs.

No. 560. *John H. Martin, plaintiff in error, v. The Hazard Powder Company.* Mr. Chief Justice Waite announced the decision of the court, denying the motion to dismiss, upon the authority of *Jerome v. McCarter*, 21 Wall. 17.

Monday, December 4, 1876.

No. 70. *The County of Callaway, State of Missouri, plaintiff in error, v. Thomas J. Foster.* In error to the Circuit Court of the United States for the Western District of Missouri. Mr. Justice Hunt delivered the opinion of the court, affirming the judgment of the said circuit court in this cause, with costs and interest. In this case the court find that where the county has issued bonds in aid of a railway built upon the route selected by the county, and has paid the interest and a portion of the principal thereof, it is estopped to deny the validity of the bonds. Also, that where such a subscription is legally made it is immaterial that the bonds were issued at a later date than the subscription. Justices Miller, Davis, Field, and Bradley dissented as to construction of the act under which the bonds were issued.

No. 81. *John M. Barclay, plaintiff in error, v. The Board of Levee Commissioners, Parishes of Madison and Carroll.* In error to the Circuit Court of the United States for the District of Louisiana. Mr. Justice Bradley delivered the opinion of the court, affirming the judgment of the said circuit court, with costs. In this case it is held that a corporation created for municipal purposes, being superseded by new and different corporations created for accomplishing the same purposes, ceases to exist, except so far as its existence is expressly continued for special objects, such as settling up its indebtedness, and the like. In such cases, if no provision is made for the continuance or new election of the officers of the corporation, the functions of the existing officers will cease when their respective terms expire, and the corporation will be *de facto* extinct; and if there be a judgment against the corporation, a mandamus will not lie to enforce the assessment of taxes for its payment, for want of officers upon whom to serve the process. The court cannot compel the new corporation, by mandamus, to perform the duties of the extinct one in such matters, especially where the jurisdiction is not the same and the law has not authorized a levy; nor can the court order the marshal to levy taxes in these cases, nor in any case, except where the proceeding is authorized by law; another judgment creditor is without remedy and can only apply to the legislature for relief.

No. 106. *Moritz Cohn, appellant, v. The United States Corset Company et al.* Appeal from the Circuit Court of the United States for the Southern District of New York. Mr. Justice Strong delivered the opinion of the court, affirming the decree of the said circuit court, with costs. In this case the court affirms the decree below in favor of the company, holding that the invention claimed by Cohn was anticipated by an English patent; Mr. Justice Clifford, dissenting.

No. 110. *Samuel G. Jones, appellant, v. The City of Pensacola*; No. 111. *Edward Broughton, appellant, v. The City of Pensacola.* Appeals from the Circuit Court of the United States for the Northern District of Florida. Mr. Justice Field delivered the opinion of the court, affirming the decrees of the said circuit court in these causes, with costs, without prejudice to the plaintiff's right to proceed at law. It is here held that where a municipal corporation is authorized to take stock in a railroad corporation, and issue its obligations in payment, it is to that extent to be deemed a private corporation, and its obligations are secured by all the guarantees which protect the engagements of private individuals. The inhibition of the Constitution, which protects contracts against state interference, applies to the liabilities of municipal corporations created by its permission; and although the repeal or modification of the charter of a corporation of the kind is not within inhibition, yet it will not be admitted, except when its legislation is susceptible of no other construction that a state has in this way sustained an evasion of, or an escape from, liabilities, the creation of which it authorized; hence, where a new form is given to an old corporation of this sort, or such a corporation is reorganized under a new charter, covering the same territory, embracing substantially the same corporations, it will be presumed that the legislature intended a continued existence of the same corporation, although different powers are given by the new charter, and different officers administer its affairs.

No. 112. *Samuel Smith et al., plaintiffs in error, v. Myra Clark Gaines.* In error to the Circuit Court of the United States for the District of Louisiana. Mr. Justice Miller delivered the opinion of the court, affirming the judgment of the said circuit court, with costs and interest. This was the action of Mrs. Myra Clark Gaines to make the sureties of the city of New Orleans responsible for the amount of the judgment against the city. The court hold that under the laws of Louisiana sureties on an appeal bond operating as a *supersedeas* are liable to judgment against them by a summary proceeding after execu-

tion on the original judgment has been issued, and a return of *nulla bona* made by the proper officer; that the truth of this return cannot be questioned in subsequent proceeding against the sureties. Nor can the officer making the return be compelled to amend or modify it unless he desires to do so. The fact that the defendant in the original judgment has been garnisheed, or the judgment sold at the instance of the creditors of the plaintiff, is no defence for the sureties in the proceeding against them, where they have not been made parties to any such proceeding to appropriate the original judgment against their principal.

No. 109. *The Indianapolis & St. Louis Railroad Co., plaintiff in error, v. Henry Horst.* In error to the Circuit Court of the United States for the District of Indiana. Mr. Justice Swayne delivered the opinion of the court, affirming the judgment of the said circuit court, with costs and interest. In this case the court affirms a judgment recovered by Horst against the company for damages sustained while travelling on a pass with his stock, in consequence of falling from the top of a car while a change of the caboose was being made, the court finding that the charge of negligence on the part of the agents of the company was sustained.

No. 105. *Emory E. Norton, assignee, &c. plaintiff in error, v. Edgar A. Switzer.* In error to the Supreme Court of the State of Louisiana. Mr. Justice Clifford delivered the opinion of the court, affirming the judgment of the said supreme court, with costs in this court. It is here said that state legislatures have no authority to create a maritime lien; nor can they confer any jurisdiction upon a state court to enforce such a lien by a suit or proceeding *in rem*, as practised in admiralty courts. Causes of action giving rise to a maritime lien, whether contracts or torts, may, however, be prosecuted in other modes of proceeding as well as *in rem* in admiralty, if the party chooses to waive his lien and proceed *in personam* or at law.

No. 765. *A. Yznaga Del Valle, plaintiff in error, v. Charles K. Harrison et al.* In error to the Circuit Court of the United States for the District of Louisiana. Mr. Chief Justice Waite delivered the opinion of the court, dismissing the writ of error for want of jurisdiction.

No. 125. *Frederick Herhold, plaintiff in error, v. Clark W. Upton, assignee, &c.* In error to the Circuit Court of the United States for the Northern District of Illinois. Mr. Chief Justice Waite announced the decision of the court, affirming the judgment of the said circuit court, with costs and interest.

No. 104. *The United States, plaintiffs in error, v. Annie Fox et al.* Mr. Chief Justice Waite announced the decision of the court, ordering this cause for reargument.

No. 150. *Robert P. Dodge et al., appellants, v. The Freedman's Savings & Trust Company.* Appeal from the Supreme Court of the District of Columbia. Mr. Justice Hunt delivered the opinion of the court, affirming the decree of the said supreme court, with costs. In this case the principle is reaffirmed that declarations made by the holder of a chattel mortgage, or a promissory note, while he holds it, are not competent evidence in a suit upon it, or in relation to it by a subsequent owner; hence, the declarations of W. S. Huntington, who at one time held certain notes made by Dodge, that they were paid, are not evidence to defeat a recovery thereon in the hands of the bank.

No. 3. (original). *The State of Florida, complainant, v. E. C. Anderson et al.* Mr. Justice Bradley delivered the opinion of the court, decreeing the amount of money returned into this court be paid over to the State of Florida.

No. 118. *Richard N. Windsor et al., devisees, &c. plaintiff in error, v. William N. McVeigh*; No. 163. *Ann Gregory, plaintiff in error, v. Wm. N. McVeigh.* In error to the Corporation Court of the city and county of Alexandria, Va. Mr. Justice Field delivered the opinion of the court, affirming the judgments of the said corporation court in these causes, with costs and interest on amount of damages recovered. Dissenting, Mr. Justice Hunt, Mr. Justice Miller, and Mr. Justice Bradley. These were actions by McVeigh to recover property which had been confiscated. The court below held that McVeigh had not had sufficient notice of the confiscation proceedings, and judgment was given for him. That judgment is here affirmed, the court holding that the jurisdiction acquired by the seizure in such cases is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity had been afforded to the owners or parties interested to appear and be heard upon the charges against them. Some notification beyond that arising from the seizure is essential, prescribing the time within which appearance must be made, and not being given in these cases by the usual modes, the decree of condemnation is held to be void.

No. 124. *H. P. Bigelow, administrator, &c. plaintiff in error, v. The Berkshire Life*

Insurance Co. In error to the Circuit Court of the United States for the Northern District of Illinois. Mr. Justice Davis delivered the opinion of the court, affirming the judgment of the said circuit court in this cause, with costs. In this case the court held that where the policy of insurance provided that it should be void in case the insured should commit suicide, sane or insane, the fact appearing that death was by suicide, the plea of insanity or of unconsciousness of act is no answer to the allegation of suicide; and it is said that it is not perceived why insurance companies cannot limit their risks in any manner they see fit, provided the insured is told in proper language of the extent of the limitation, and it is not against public policy.

DIGEST OF CASES

PUBLISHED IN EXTENSO IN LATE ISSUES OF AMERICAN LEGAL PERIODICALS.

ABBREVIATIONS.

Albany L. J. — *Albany Law Journal*, Albany, N. Y., WEED, PARSONS, & CO.
 Am. Law Rec. — *American Law Record*, Cincinnati, O., H. M. MOOS.
 Am. Law Reg. — *American Law Register*, Philadelphia, Pa., D. B. CANFIELD & CO.
 Cent. L. J. — *Central Law Journal*, St. Louis, Mo., SOULE, THOMAS, & WENTWORTH.
 Chicago L. N. — *Chicago Legal News*, Chicago, Ill., CHICAGO LEGAL NEWS CO.
 Daily Reg. — *Daily Register*, New York, 303 Broadway.
 Ins. L. J. — *Insurance Law Journal*, New York, C. C. HINE, 176 Broadway.
 Int. Rev. Rec. — *Internal Revenue Record*, New York, W. P. & F. C. CHURCH.
 La. L. J. — *Louisiana Law Journal*, New Orleans, La.
 Leg. Chron. — *Legal Chronicle*, Pottsville, Pa., SOL. FOSTER, JR.
 Leg. Gaz. — *Legal Gazette*, Philadelphia, Pa., KING & BAIRD.
 Leg. Int. — *Legal Intelligencer*, Philadelphia, Pa., J. M. POWER WALLACE.
 Mo. West. Jur. — *Monthly Western Jurist*, Bloomington, Ill., T. F. TIPTON.
 N. B. R. — *National Bankruptcy Register*, New York, CAMPBELL & CO.
 Pac. Law. Rep. — *Pacific Law Reporter*, San Francisco, Cal., J. P. BOGARDUS.
 Pittsb. L. J. — *Pittsburg Legal Journal*, Pittsburg, Pa., J. W. & J. S. MURRAY.
 W. L. R. — *Washington Law Reporter*, Washington, D. C., JNO. L. GINCK.
 West. Jur. — *Western Jurist*, Des Moines, Iowa, MILLS & CO.

ADMIRALTY.

1. REVISED STATUTES, SECTIONS 1956 AND 4337. — A vessel is not engaged in the violation of section 1956 of the Revised Statutes, which provides that "no person shall kill any . . . fur, seal . . . within the limits of Alaska Territory," &c., unless such vessel is used or employed in the actual killing of such seal; and a mere preparation or intention upon the part of her master or owners so to employ her is not sufficient to constitute the offence, if for any reason no seals are killed. A vessel enrolled and licensed for the fisheries does not violate section 4337 of the Revised Statutes, which prohibits such vessel from proceeding on a foreign voyage without being registered, by touching at, or entering, the foreign port of Victoria, for supplies or any purpose other than trade, on her way from San Francisco to the fishing grounds on the northwest coast. *The Ocean Spray*, D. C. U. S. Or., Cent. L. J., December 1, 1876; Pac. Law Rep., December 5, 1876.

2. WHO ARE MARINERS. — All persons who are employed on a vessel to assist in the main purpose of the voyage are mariners, and, therefore, persons who shipped on *The Ocean Spray* at Victoria as sealers, to take seal in the northern waters, — that being the object of the voyage, — are mariners, and have a lien upon the vessel for their wages. *Ib.*

3. STOPPAGE OF VOYAGE. — RIGHTS OF SEAMEN. — When a voyage is broken up or lost by the act or fault of the master or owner, the seamen are nevertheless entitled to their wages for the full voyage, or the time which it would probably require to complete it. *Ib.*

4. THE RULE "FREIGHT IS THE MOTHER OF WAGES," does not apply to a fishing or sealing voyage, and appears to be abolished altogether by section 4525 of the Revised Statutes. *Ib.*

5. MORTGAGE. — WHERE THE LOCAL LAW GIVES A LIEN UPON THE VESSEL FOR SUPPLIES and repairs, and after a mortgage is given on the vessel repairs are bestowed on such vessel, that a title acquired under such mortgage is subject to the lien for such repairs. *Brown v. Graves*,¹ D. C. U. S. N. D. N. Y.

BILLS AND NOTES.

See INJUNCTION ; MECHANIC'S LIEN.

CONSTITUTIONAL LAW.

1. RECOGNITION OF VALIDITY OF PUBLIC ACT. — EFFECT OF. — JOURNAL OF LEGISLATURE, ETC. — Where an act of the legislature was passed and published more than eleven years, and since that time all of the departments of the state government — the legislative, the executive, and the judicial, — have held it to be valid, and its validity has never before been questioned upon the grounds urged against it, and the only objection ever before urged against its validity was that the legislature had no constitutional power to pass such acts, which objection was long ago overruled by the courts, and many rights had accrued under the act in the honest belief of its validity. *Held*, that unless a very clear showing of its invalidity could be made it would be the duty of the courts to hold the act valid. Where such an act was duly passed by both branches of the legislature more than eleven years before action, and the senate journal showed that the senate concurred in certain amendments made to the bill by the house, but did not show affirmatively whether the yeas and nays were taken on such concurrence, and the yeas and nays on such concurrence are not entered on the journal, and the act has generally been considered valid, and many rights have accrued thereunder: *Held*, that said act would not be declared invalid merely because the yeas and nays were not entered on the senate journal as aforesaid. *Board, &c. of Leavenworth v. Higgenbotham*, S. C. Kans., Cent. L. J., November 17, 1876.

¹ Of this case the editor of the *Chicago Legal News* writes as follows: "It is somewhat singular that Judge WALLACE should not have referred to the opinion of Judge DRUMMOND, in *Miller et al. v. The Proceeds of the Kate Hinchman*, 8 *Chicago Legal News*, 388, in delivering his judgment in this case, as his attention had been called to it, and a conclusion

directly the opposite was arrived at by Judge DRUMMOND. Messrs. *Ray & Mitchell*, in arguing the case of *The Kate Hinchman*, claimed, with all the ingenuity they possessed, that the law was as now stated by Judge WALLACE, but they failed to convince the learned Judge. Judge DRUMMOND fortifies his opinion by several authorities." — EDITOR.

2. EVIDENCES OF PASSAGE OF ACT, ETC. — The signatures of the presiding officers of the two houses of the legislature to an enrolled bill are only portions of the many evidences of the due passage and validity of such bill. And courts must decide as to the passage and validity of a bill upon the whole of the legal evidence applicable in such cases. Therefore, where the enrolled bill of a certain act, and the legislative journals taken together, clearly show that the bill was duly passed by the legislature and approved by the governor, and where all the extrinsic evidence having any application to the case also shows the same thing: *Held*, that the bill should be held to be valid, although it may not have the signature of the presiding officer of the senate affixed to it. *Ib.*

CONTEMPT.

See RECEIVER.

CONTRACT.

IF IT IS THE DESIGN OF A CONTRACT TO ACCOMPLISH A SINGLE OBJECT, as building and repairing certain dams to improve navigation, and it is stipulated that a certain percentage of the price be retained until the whole is completed, it is an *entire* contract. *Quigley v. De Haas*,¹ S. C. Pa., Leg. Int., December 8, 1876.

CORPORATION.

See JURISDICTION.

¹ GORDON, J., writes as follows: "The rule as adopted in the case of *Lucasco Oil Co. v. Brewer*, 16 Sm. 31, from Parson on Contracts, that if the part to be performed by one party consists of several and distinct items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such contract will generally be held to be severable, is certainly applicable to contracts such as that which was under consideration in that case. But it is not even intimated that the circumstances therein stated would over-ride the clear intention of the parties, if such intention were apparent from the whole face of the agreement. Indeed, it is expressly said by the author, by whom the above rule is stated, that no precise rule can be given by which this question, in a given case may be settled, but, like most other questions of construction, it must depend upon the intention of the parties as gathered from the whole subject matter of the contract. 2 Par. on Cont. 517. In any view, this contract must be taken as entire. It was designed to accomplish a single object, to wit, the navigability of the stream therein mentioned. It was one job, though made up of several items; there was one price, though,

for convenience, because the work was to be paid for as it progressed, it was apportioned to the several items. Even this apportionment must be taken as inseparable from the whole work, for it is more than probable that, for instance, the price of fourteen hundred dollars for building each dam, was a value put upon such dams as part of the whole job, rather than as separate isolated items; for the dams would be worth little or nothing with the remainder of the creek unimproved. The parties themselves have, however, put this matter beyond doubt by the following clause in their agreement, to wit: 'Out of all the above estimated costs of each of the respective divisions of work, Quigley and Bailey shall be privileged to retain fifteen *per centum* until the *whole* is completed, in a satisfactory manner, according to contract.' That this provision was designed to secure the proper completion of the whole work is not open to doubt, and if the plaintiff is permitted to recover full price for a partial performance, it is certain that this covenant is, in effect, abrogated. We conclude, therefore, that the court below was wrong in holding the subject matter of this contract to be severable." — EDITOR.

CRIMINAL LAW.

BURGLARY. — The unlatching or breaking of a door, in an attempt to escape, does not constitute burglary under a statute making it burglary to break or enter. *Rolland v. The Commonwealth*, S. C. Pa., Leg. Int., November 10, 1876.

DEED.

1. **THE ACKNOWLEDGMENT OF A DEED BY A MARRIED WOMAN** substantially complies with the act if it sets forth an examination apart from the husband, her full knowledge of its contents, and her execution of it without fear or compulsion of her husband. The latter is equivalent to a declaration of free will. *Miller v. Wentworth*, S. C. Pa., Leg. Int., December 8, 1876.

2. **WHEN AN ORIGINAL DEED HAD BEEN DESTROYED** before stamping, and no copy preserved, a draft made, as nearly as possible, from memoranda, the survey, and memory, was presented to the judge, permitted to be stamped and certified under the Act of Congress of July 23d, 1874. *Held*, sufficient to restore the instrument as evidence. *Ib.*

DOWER.

1. **THE WIFE MAY MAINTAIN AN ACTION TO PRESERVE HER RIGHT OF DOWER WHILE HER HUSBAND IS LIVING**; as: where by fraud the husband is allowing his real estate to be sold under execution, in order to defeat the dower of his wife, she may have the sale set aside so far as to protect her dower.¹ *Buzick v. Buzick*, S. C. Iowa, West. Jur., November, 1876; Cent. L. J., December 8, 1876.

2. **JOINTURE OR MARRIAGE SETTLEMENT IN LIEU OF DOWER.** — **REQUISITES OF.** — Under section two of the Dower Act of Ohio (1 S. & C. 516), an estate conveyed as jointure, to be a good legal or statutory bar to dower, must be such an estate, as to certainty and kind, that the wife, on the death of her husband, may take possession of, and hold in severalty, and not in common with others.

If the estate so conveyed be such as that at common law dower could be assigned by metes and bounds, then in such case the jointure, to be a legal bar to dower, should be an estate in severalty, so that the widow may enter and hold in severalty, without being compelled to resort to an action to have her jointure assigned to her by metes and bounds. *Grogan v. Garrison*, S. C. Ohio, Am. Law Reg., November, 1876.

3. **AN ANTENUPTIAL CONTRACT WHICH** conveys an undivided one third part, or any other interest in common with others, in lieu of dower, is not a good statutory bar.

Whether such an estate will constitute a good equitable jointure depends on the facts and circumstances of the case, and when such contract is pleaded by way of equitable defence to an action for dower, the facts upon which it depends, and not the pleader's conclusions from the facts, must be stated. *Ib.*

¹ Under the statutes of Iowa the wife is endowed of one third in fee of all real estate owned by the husband during coverture and which has not been alienated under judicial sale. — *EDITOR.*

4. THE CONVEYANCE OF AN ESTATE AS JOINTURE, of an undivided one third of a lot of land for the life of the wife, when such lot is less than one third of the husband's lands, is *prima facie* not a good equitable jointure, in the absence of facts showing that the same is fair and reasonable, or of such acts of the widow as amount to an estoppel. *Ib.*

5. THE ANTENUPTIAL COVENANT OF A WOMAN, THAT IN CASE SHE SURVIVE HER HUSBAND SHE WILL NOT CLAIM DOWER IN HIS ESTATE, cannot, in an action by her for dower, operate to bar such action, either by way of release or estoppel, where such antenuptial contract does not constitute either a legal or equitable bar. *Ib.*

EVIDENCE.

See CONSTITUTIONAL LAW, 2; DEED, 2.

FIXTURE.

FIXTURE DEFINED. — The principal consideration in determining whether or not an article is a fixture is the *intention of the party making the annexation*. *Ottumwa Woollen Mill Co. v. Hawley*, S. C. Iowa, West. Jur., November, 1876.

FOREIGN LAW.

JUDGMENT. — LIMITATIONS. — LEX LOCI. — The full faith and credit required to be given to records of judicial proceedings in another state, means that such record shall have the same effect as records of home proceedings of like nature.

In actions on such records, the statute of limitations of the state where the actions are brought must govern. That statute is a plea to the remedy, and therefore to be governed by the *lex fori*.

The statute of Kentucky bars any further proceeding on a judgment after fifteen years from the last execution thereon. An action in Kentucky cannot be maintained on an Ohio judgment upon which no execution had issued for more than fifteen years. Nor does it make any difference that within fifteen years the Ohio judgment has been revived in that state. Such revivor is simply a restoration of a lien, not a new judgment. *McArthur v. Goddin*, Ct. App. Ky., Am. Law Reg., November, 1876.

INJUNCTION.

BILLS AND NOTES. — An injunction to stay proceedings in a suit at law, upon a note, ought not to be granted, at the instance of the defendant in the suit, unless after judgment or upon the terms of permitting judgment to go at law, where the bill seeks no discovery or particular relief to aid the legal defence, and shows no defence to the demand sued on other than that upon which the litigation is sought to be transferred into this court. *Chadwell v. Jordon*, Ch. Ct. of Nashville, Tenn., Cent. L. J., Dec. 8, 1876.

INSURANCE.

FORFEITURE FOR NON-PAYMENT OF PREMIUM NOTE. — The policy provided that in consideration of an annual cash premium of \$179.55, and

an annual loan note with interest of \$89.75 during ten years, it assured the life of H. for the term of life; also, that a due proportion of surplus should be returned; also, that in case of default in the payment of any premium, as many tenths of the original sum insured would be paid as there had been complete annual premiums paid. But in order to secure such proportion, all premium notes must be taken up, or the interest be paid within three months after it was due, until the notes are cancelled by returns of the surplus, or the whole policy will be forfeited, unless one or more annual payments have been made in full by cash payment, or by application of the dividend. The policy was accepted upon the following, among other conditions: If the premium or the interest on any note should not be paid on or before the time specified, the company shall only be liable for such proportional part of the sum insured as provided for above. On the policy was indorsed the statement that the dividends in the case of note policies would be first applied to the unpaid interest, and then to the notes, which were non-assessable. "This policy is non-forfeitable. Each complete yearly payment secures its proportion of the policy. . . . If payments of premium are at any time discontinued, this policy is full paid for an amount equal to as many proportionate parts of the original insurance as there have been complete annual premiums paid at the time of such default." The note contained a promise to pay the interest annually, or the policy should be forfeited. The policy lapsed by non-payment of the fourth annual premium. The interest on the notes, amounting to \$24.80, was not paid, but there was due the insured \$51.15 dividend. *Held*, that the insured was entitled to have the unpaid interest offset by the dividend, and the forfeiture was limited to seven tenths of the original sum. *Hull v. U. W. Life Ins. Co.*, Ins. L. J.; Cent. L. J., December 1, 1876.

JUDGMENT.

See FOREIGN LAW.

JURISDICTION.

JOINT STOCK ASSOCIATION ORGANIZED UNDER STATE LAW. — A joint stock association, organized under the laws of the State of New York, with a distinct legal existence, the privilege of perpetual succession, the right of making contracts by an artificial name, and of suing and being sued in the name of its president or treasurer, is so far a citizen of that state that an action against it can be maintained by a citizen of another state in a federal court, irrespective of the citizenship of the individual members of such association. *Maltz v. Am. Ex. Co.*, C. C. U. S. E. D. Mich., Cent. L. J., December 8, 1876.

LANDLORD AND TENANT.

MORTGAGE. — LANDLORD'S LIEN ON CROP NOT IN ESSE. — R. the lessor retained a lien in the lease on the annual crops of cotton, &c., to secure the rent of \$3,500 per annum (for the plantation), for the term of five years. The lessees, the third year of the term, gave a mortgage to E. & Co., for supplies furnished that year, and for an antecedent debt.

Held, that the right of the landlord was superior to that of the mortgagees, E. & Co. *Everman v. Robb*, S. C. Miss., Cent. L. J., November 17, 1876.

LEX LOCI.

See FOREIGN LAW.

LIMITATIONS.

See FOREIGN LAW; MUNICIPAL CORPORATION.

MARRIED WOMAN.

See DEED, 2; DOWER.

MECHANIC'S LIEN.

NOTICE OF LIEN. — PARTNERSHIP. — TRANSFER OF NOTE TO MATERIAL-MAN. — WHERE LIEN COVERS ONLY PART OF LAND. — A notice of a mechanic's lien signed with a copartnership name, instead of with the individual names of the partners, is not invalid for that reason.

A mechanic's lien for materials furnished upon a joint contract with a copartnership, will bind the interest of one of such parties who alone has title to the real estate upon which the building was erected.

The mere transfer of a promissory note to the material-man will not release his lien, unless the same is paid at maturity, or unless it is taken in payment of the account.

The lien is not invalid, although it does not cover all the land connected with the building, to which the owner has a title deed. *Smith v. Johnson*, S. C. D. C., W. L. R., December 2, 1876.

MORTGAGE.

See ADMIRALTY, 5; LANDLORD AND TENANT.

MUNICIPAL CORPORATION.

LIMITATIONS. — WHERE A COUNTY OWES A DEBT, IN WRITING, which has been due for more than five years (that being the period prescribed by the state statute of limitations), but the county has paid the interest on such a debt up to within less than five years, and has otherwise within that time, in writing and repeatedly, acknowledged its liability to pay such debt: *Held*, that the five year statute of limitation has not barred an action for the recovery of such debt. *Bd., &c. of Leavenworth v. Higginbotham*, S. C. Kans., Cent. L. J., Nov. 17, 1876.

NOTARY PUBLIC.

THE SUPREME COURT D. C. WILL TAKE NOTICE OF THE AUTHORITY OF A NOTARY PUBLIC in the State of Maryland to administer an oath to an affidavit, to be used in an action pending in this jurisdiction; the same being certified by his signature and notarial seal, without any other verification that he was qualified to act as such notary. *Denmead v. Maack*, S. C. D. C., W. L. R., November 25, 1876.

PARTNERSHIP.

See MECHANIC'S LIEN.

RECEIVER.

ACTION AGAINST, IN ANOTHER COURT THAN THAT BY WHICH RECEIVER HAS BEEN APPOINTED. — CONTEMPT. — PRACTICE. — In such cases, the proper practice is for the person having a demand against the fund in the hands of the receiver to bring his demand into the court appointing the receiver, and the court will direct him to be examined, *pro interesse suo* before the master, and if, upon auditing his claim, the court finds it to be a just one, it will direct the receiver to pay it without litigation; but if the court finds the claim to be a doubtful one, it will give the claimant leave to prosecute it against the receiver before some competent court, — consulting herein the convenience of parties and exercising a judicial discretion. A person who brings an action in one court against a receiver appointed by another court, without the consent of the court whose officer such receiver is, is guilty of a contempt of the latter court: and this is so although such action may not result in disturbing the possession of the receiver. This doctrine applies with peculiar force to cases where suits are brought in the state courts against receivers appointed by the federal courts, in actions brought by citizens of other states, to foreclose railway mortgages. *Thompson v. Scott*, C. C. U. S. Iowa, Cent. L. J., November 17, 1876.

REVISED STATUTES.

See ADMIRALTY, 1, 4.

SUPREME COURT OF MAINE.

(To appear in 65 Me.)

EVIDENCE. — TRIAL. — JURORS.

STATE v. NEAGLE.

Upon the trial of one charged with having in his possession intoxicating liquors with intent to sell the same in violation of the law, the record of his previous conviction for a similar offence is admissible in evidence upon the question of intent.

And the docket entries may be read to the jury, when a more extended record has not been made.

Irregularity in the drawing of jurors is not a ground for setting aside a verdict, unless it appears that the party, moving to have the verdict set aside, was injured by the irregularity.

COMPLAINT, for search and seizure of intoxicating liquors, on appeal from the municipal court of Bath.

On the trial of the appeal, the government introduced the judge of the municipal court as a witness, who was allowed, against objection, for substance and form, to read his docket entry of a former conviction of respondent for a similar offence. After the verdict of guilty, the defendant moved to set it aside for informality in the drawing of the jurors who sat in the trial.

In the hearing of the motion, it appeared in evidence that before the jurors named therein, who were a part of the jury who rendered the verdict, were drawn, the tickets containing the names of jurors who had served within three years previous had been withdrawn from the jury box of the city of Bath, and still remained out, and the defendant had no knowledge of the fact before the verdict was rendered. The judge overruled the motion, and the defendant alleged exceptions.

W. Gilbert, for the defendant.

W. T. Hall, county attorney, for the state.

WALTON, J. Upon the trial of one charged with having in his possession intoxicating liquors with intent to sell the same in violation of law, the record of a previous conviction of a similar offence is admissible in evidence upon the question of intent. So decided in *State v. Plunkett*, 64 Maine, 534.

And the docket entries may be read to the jury, when a more extended record has not been made. *Leathers v. Cooley*, 49 Maine, 337; *Pierce v. Goodrich*, 47 Maine, 173; *Longley v. Vose*, 27 Maine, 179; *Read v. Sutton*, 2 Cush. 115; *Pruden v. Alden*, 23 Pick. 184.

Irregularity in the drawing of jurors is not a ground for setting aside a verdict, unless it appears that the party moving to have the verdict set aside was injured by the irregularity. R. S. c. 82, § 78; R. S. c. 134, § 20. No such injury appears in this case.

Exceptions overruled. Judgment on the verdict.

APPLETON, C. J., DICKERSON, BARROWS, VIRGIN, PETERS, and LIBBEY, JJ., concurred.

NOTES OF NEW BOOKS.

THE CENTRAL LAW JOURNAL is now published, as well as edited, by Mr. Seymour D. Thompson. This journal has many claims to excellence. It has been edited with great judgment, and merits the cordial support of the Bar in the East, no less than the West.

FREEMAN ON EXECUTIONS. San Francisco: Sumner, Whitney, & Co. Perhaps no more comprehensive criticism of this volume could be made than to state that it is done in the same manner and probably as well as the author's work on JUDGMENTS. It is perspicuous, exhaustive, and as near what such a treatise ought to be, in every important respect, as a very exacting lawyer would require. It is manifestly in advance of the average law book of the day.

OTTO'S REPORTS of the Decisions of the Supreme Court of the United States. Vol. II. of Judge Otto's Reports has been issued by Messrs. Little, Brown, & Co.

CURTIS ON COPYRIGHTS, which has been promised by the same house for a long time, is said to be in press and about to be published.

THE AMERICAN LAW TIMES.

NEW SERIES. — FEBRUARY, 1877. — VOL. IV., No. 2.

NOTES OF OPINIONS, DECISIONS, AND ORDERS

OF THE

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1876.

Monday, December 4, 1876.

No. 895. *Charles E. Wiswall et al., plaintiffs in error, v. George W. Campbell et al., assignees, &c.* In error to the Circuit Court of the United States for the Northern District of Illinois. Mr. Chief Justice Waite delivered the opinion of the court, dismissing the writ of error in this cause for the want of jurisdiction. The point decided is, that proceedings by creditors to prove their demands against the estate of a bankrupt are part of the suit in bankruptcy, and not separate and independent suits at law or in equity.

No. 745. *Milo Hoadley, appellant, v. The City and County of San Francisco.* Appeal from the Circuit Court of the United States for the District of California. Mr. Chief Justice Waite delivered the opinion of the court, affirming the decree of the said circuit court, with costs. Hoadley claimed certain lands in the city under the operation of ordinances of the corporation, and whether he was so entitled or not was the question to be determined. The court finds that the question is strictly within the state laws, and that it was properly decided in favor of the city in accordance therewith.

No. 4. *Richard C. Kimball et al., plaintiffs in error, v. William F. Evans et al.* In error to the Supreme Court of the State of Ohio. Mr. Chief Justice Waite delivered the opinion of the court, dismissing the writ of error in this cause for the want of jurisdiction. The judgment for review not being a final one of the highest court of the state the writ of error is dismissed.

No. 83. *Antonio Berreyesa, administrator, &c., appellant, v. The United States.* Appeal from the District Court of the United States for the District of California. Mr. Chief Justice Waite delivered the opinion of the court, affirming the decree of the said district court in this cause. In conformity with prior decisions in such cases, this is decided adversely to the claimant, because it does not appear that a grant from the Mexican government had been deposited in the proper public office among the public archives of the Republic of Mexico.

No. 127. *Annie L. Watt, appellant, v. Chas. Hill and Tip Gamble.* Appeal from the District Court of the United States for the Northern District of Mississippi. Mr. Chief Justice Waite announced the decision of the court, affirming the decree of the said district court, with costs, the appellant not appearing and there being no assignment of errors.

Monday, December 11, 1876.

No. 564. *Frederick De Bary et al., plaintiffs in error, v. Chester A. Arthur, Collector, &c.* In error to the Circuit Court of the United States for the Southern District of New York, Mr. Justice Hunt delivered the opinion of the court, affirming the judgment of the said circuit court, with costs. In this case the court affirms the judgment of the circuit court

holding that under the statute the duty upon champagne in bottles is \$6 per dozen for the wine, and thirty-six cents per dozen for the bottles, in addition to the specific tax upon the wine.

No. 115. *James Callanan, Jun., appellant, v. Michael Hurley*. Appeal from the Circuit Court of the United States for the District of Iowa. Mr. Justice Strong delivered the opinion of the court, reversing the decree of the said circuit court, with costs, and remanding the cause with directions to dismiss the bill. It is here held that a treasurer's deed for lands sold for delinquent taxes in Iowa, if substantially regular in form, is, under the statute of that state, at least *prima facie* evidence that a sale was made; and if there was a *bonâ fide* sale, in substance or in fact, the deed is conclusive evidence that it was made at a proper time, and in the proper manner. So, in a case where the tax-deed, regular in form, recited that the land was sold on January 4, and where the treasurer testified that the sale of land for delinquent taxes in the county began on that day and was continued from day to day until January 18, and that he entered all of the sales as made on the 4th; the sale at any time between those dates was valid; and that recording the sale as of the first day, though actually made later, did not impair the title.

No. 56. *Daniel R. Brandt, appellant, v. The Virginia Coal Iron Company et al.* Appeal from the Circuit Court of the United States for the District of West Virginia. Mr. Justice Field delivered the opinion of the court, reversing the decree of said circuit court, with costs, and remanding the cause for further proceedings, in conformity with the opinion of this court. Dissenting, Mr. Justice Swayne and Mr. Justice Davis. It is here held that where a testator made a bequest to his wife of all his estate, real and personal, "to have and to hold during her life and to do with it as she sees proper before her death," the wife took a life estate in the property with only such power as a life tenant can have, and that her conveyance of the real property passed no greater interest; that for the application of the doctrine of equitable estoppel with respect to the title of property, there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud by which another has been misled to his injury; and that, where the estoppel relates to the title of real property, it is essential to the application of the doctrine that the party claiming to have been influenced by the conduct or declarations alleged shall be not only destitute of the knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge. Both parties having the same means of ascertaining the truth, there is no estoppel.

No. 49. *Wm. F. White et al., plaintiffs in error, v. Nicholas Luning*. In error to the Circuit Court of the United States for the District of California. Mr. Justice Davis delivered the opinion of the court, affirming the judgment of the said circuit court in this cause, with costs. This, it is said, is the case of a mortgagor unable to pay his debt and getting it satisfied by a sale of the mortgaged property, seeking to prevent his creditor, who had doubtless been compelled to purchase the property, from recovering possession of it, on the ground that no title passed to him by reason of misdescription in the deed of the sheriff, when, if there be any misdescription, it was presumably caused by him, as the property was offered for sale in parcels by his direction and for his advantage. As it was not found that the description errors misled any one, or caused any sacrifice of the property, it was held that no one was injured by them, and that there was no merit in the defence.

No. 132. *Joseph Dalton, plaintiff in error, v. Abraham G. Jennings*. In error to the Circuit Court of the United States for the Southern District of New York. Mr. Justice Miller delivered the opinion of the court, affirming the judgment of the said circuit court, with costs. In this case it is held that the patent of John Dalton for "a head or hair-net composed of a main set of meshes fabricated of coarse thread, combined with an auxiliary set or sets of meshes fabricated of fine thread," is void, because there is no invention in it, and because various fabrics had been made and were in public use for a long time before his application, which are precisely and accurately described by Dalton in the specification and claim of his patent.

No. 129. *The United States, appellant, v. The Philadelphia and Southern Mail Steamship Co., claimants*; No. 130. *The Philadelphia and Southern Mail Steamship Co., claimants, &c., appellants, v. The United States*; No. 628. *George Pursglove, appellant, v. The Steamship Junata, &c., et al.* Appeals from the Circuit Court of the United States for the District of Louisiana. Mr. Justice Swayne delivered the opinion of the court, modifying the decree of the said circuit court, so as to require full payment to be made to

the United States by the claimants of the steamship Juniata of all damages sustained, as found by the commissioner, and affirming the decrees in all other respects.

No. 123. *John Dunbar et al., appellants, v. Margaret Myers, executrix, &c.*; No. 737. *Margaret Myers, executrix, &c., appellant, v. John Dunbar et al.* Appeals from the Circuit Court of the United States for the Southern District of New York. Mr. Justice Clifford delivered the opinion of the court, reversing the decree of the said circuit court, and remanding the cause, with directions to enter a decree dismissing the bill of complaint. Costs in this court to be paid by complainants. This was the reversal of a decree finding an infringement of the appellees' patent for an improvement in saws, the court holding that the invention lacked novelty. The court say, in respect of inventions, that a better opinion is that an improvement claimed should involve invention to make it, as the patent act confers no right to obtain a patent except to a person who has invented or discovered some new and useful art, machine, manufacture, or composition of matter, or some new and useful improvement in one or the other of those described subject matters.

No. 731. *Russell Sage et al., intervenors, appellants, v. The Central Railroad Company of Iowa.* Appeal from the Circuit Court for the District of Iowa. Mr. Chief Justice Waite delivered the opinion of the court, vacating the supersedeas and denying the motions to dismiss and advance this cause. Dissenting, Mr. Justice Miller and Mr. Justice Field. Motion to vacate the supersedeas granted. Motion to dismiss the appeal denied. Motion to advance the cause for hearing denied, as the case involves only private interests.

No. 14. *Catharine F. Saivon, administrator, &c., plaintiff in error, v. Dennis G. Kenny.* In error to the Circuit Court of the United States for the Eastern District of Arkansas. Mr. Chief Justice Waite delivered the opinion of the court, affirming the judgment of the said circuit court, with costs and interest. It is here said that by the Code of Practice of Arkansas, which was in force when this judgment was rendered, it was provided that "where two or more persons are jointly bound by contract the action thereon may be brought against all or any of them at the plaintiff's option;" that "judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants;" and that "though all the defendants have been summoned, judgment may be rendered against any of them severally, where the plaintiff would be entitled to judgment against such defendants if the action had been against them alone." This, under the Act of June 1, 1872 (17 Stat. 187, sec. 5; Rev. Stat. 914), furnished a rule of practice for the courts of the United States in that state.

No. 395. *The United States, appellants, v. The State National Bank of Boston.* Mr. Chief Justice Waite announced the decision of the court, denying the motion to remand this cause.

Mr. Chief Justice WAITE announced to the bar that the court would adjourn on Friday next to Monday, the 8th of January. He also announced the following amendment to Rule 6, to wit: One hour to each side shall be allowed on the argument of a motion, and no more, without special leave of the court granted before the argument begins.

DIGEST OF CASES

PUBLISHED IN EXTENSO IN LATE ISSUES OF AMERICAN LEGAL PERIODICALS.

ABBREVIATIONS.

Albany L. J. — *Albany Law Journal*, Albany, N. Y., WEEB, PARSONS, & CO.
 Am. Law Rec. — *American Law Record*, Cincinnati, O., H. M. MOOS.
 Am. Law Reg. — *American Law Register*, Philadelphia, Pa., D. B. CANFIELD & CO.
 Cent. L. J. — *Central Law Journal*, St. Louis, Mo., SOULE, THOMAS, & WENTWORTH.
 Chicago L. N. — *Chicago Legal News*, Chicago, Ill., CHICAGO LEGAL NEWS CO.
 Daily Reg. — *Daily Register*, New York, 303 Broadway.

Ins. L. J. — *Insurance Law Journal*, New York, C. C. HINE, 176 Broadway.
 Int. Rev. Rec. — *Internal Revenue Record*, New York, W. P. & F. C. CHURCH.
 La. L. J. — *Louisiana Law Journal*, New Orleans, La.
 Leg. Chron. — *Legal Chronicle*, Pottsville, Pa., SOL. FOSTER, JR.
 Leg. Gaz. — *Legal Gazette*, Philadelphia, Pa., KING & BAIRD.
 Leg. Int. — *Legal Intelligencer*, Philadelphia, Pa., J. M. POWER WALLACE.
 Mo. West. Jur. — *Monthly Western Jurist*, Bloomington, Ill., T. F. TIPTON.
 N. B. R. — *National Bankruptcy Register*, New York, CAMPBELL & CO.
 Pac. Law. Rep. — *Pacific Law Reporter*, San Francisco, Cal., J. P. BOGARDUS.
 Pittsb. L. J. — *Pittsburg Legal Journal*, Pittsburg, Pa., J. W. & J. S. MURRAY.
 W. L. R. — *Washington Law Reporter*, Washington, D. C., JNO. L. GINCK.
 West. Jur. — *Western Jurist*, Des Moines, Iowa, MILLS & CO.

ADMINISTRATOR.

PLACE OF APPOINTMENT. — TRUSTS, ETC. — A bill in equity to enforce a trust brought against an administrator alleged that the respondent as administrator withdrew a bank deposit, being the trust funds in question. The answer alleged the respondent's appointment as administrator in Massachusetts, and that as such he withdrew the deposit and held the same as part of his decedent's estate. *Held*, in the absence of denial by the administrator, that he held the deposit as administrator in Rhode Island; that the court would presume he held it as administrator in Rhode Island, and would order him to account directly with the complainant, the trust having been proven. *Ray v. Simmons*, S. C. R. I., Am. Law. Reg., December, 1876.

ADMIRALTY.

1. DOMESTIC VESSEL. — A MATERIAL-MAN HAS NO LIEN FOR REPAIRS or supplies to a domestic vessel. *The Albany*, C. C. U. S. Minn., Cent. L. J., January 5, 1877.

2. FOREIGN OR DOMESTIC VESSEL. — RESIDENCE. — ENROLMENT. — Whether a vessel is foreign or domestic depends upon the residence of her owners and not upon her enrolment, where the two are different. *Ib.*

BANKRUPTCY.

1. NUMBER AND VALUE OF CREDITORS. — ATTACHING CREDITORS. — Creditors who have obtained liens by attachment within four months before the commencement of proceedings in bankruptcy, are not to be reckoned in computing the proportion of creditors who must unite in an involuntary petition. *In re Scrafford*, C. C. U. S. Kas., Cent. L. J., January 5, 1877.

2. COMPOSITION. — ONLY ONE MEETING OF CREDITORS REQUIRED. — Under the Bankrupt Act of the United States, no second meeting of creditors to confirm the resolution of the first meeting is necessary, as required by the British act. *In re Scott, Collins & Co.*,¹ D. C. U. S. E. D. Mo., Cent. L. J., January 12, 1877.

¹ The opinion in this cause was delivered by the English act and those of the United States Judge TREAT, and is of a masterly character. The following reproduction of the provisions of act is taken from the opinion: —

UNITED STATES.
 "That in all cases in bankruptcy now pending, or to be hereafter pending, by or against

BRITISH.
 "The creditors of a debtor unable to pay his debts may, by an extraordinary resolution, re-

3. *IBID.* — *HEARING.* — *WHAT MAY BE HEARD.* — At the hearing, of which the creditors are required to have notice, objections may be pre-

any person, whether an adjudication in bankruptcy shall have been had or not, the creditors of such alleged bankrupt may, at a meeting called under the direction of the court, and upon not less than ten days' notice to each known creditor of the time, place, and purpose of such meeting, such notice to be personal or otherwise, as the court may direct, resolve that a composition, proposed by the debtor, shall be accepted in satisfaction of the debts due to them from the debtor."

"And such resolution shall, to be operative, have been passed by a majority in number and three fourths in value of the creditors of the debtor, assembled at such meeting either in person OR BY PROXY, and shall be confirmed by the signature thereto of the debtor and two thirds in number and one half in value of all the creditors of the debtor."

"And in calculating a majority for the purposes of a composition under this section, creditors whose debts amount to sums not exceeding fifty dollars shall be reckoned in the majority in value, but not in the majority in number; and the value of the debts of secured creditors above the amount of such security to be determined by the court, shall, as nearly as circumstances admit, be estimated in the same way."

"And creditors whose debts are fully secured shall not be entitled to vote upon or to sign such resolution without first relinquishing such security for the benefit of the estate."

"The debtor, unless prevented by sickness, or other cause satisfactory to such meeting, shall be present at the same, and shall answer any inquiries made of him; and he, or, if he is so prevented from being at such meeting, some one in his behalf, shall produce to the meeting a statement showing the whole of his assets and debts, and the names and addresses of the creditors to whom such debts respectively are due."

"Such resolution, together with the statement of the debtor as to his assets and debts, shall be presented to the court; and the court shall, upon notice to all the creditors of the debtor of not less than five days, and upon hearing, inquire whether such resolution has been passed in the manner directed by this section; and if satisfied that it has been so passed, it shall, subject to the provisions hereinafter contained, and upon being satisfied that the same is for the

solve that a composition shall be accepted in satisfaction of the debts due to them from the debtor."

"An extraordinary resolution of creditors shall be a resolution which has been passed by a majority in number and three fourths in value of the creditors of the debtor, assembled at a general meeting to be held in the manner prescribed, of which notice has been given in the prescribed manner, and has been confirmed by a majority in number and value of the creditors assembled at a subsequent general meeting, of which notice has been given in the prescribed manner, and held at an interval of not less than seven days nor more than FOURTEEN days from the date of the meeting at which such resolution was first passed."

"In calculating a majority for the purposes of a composition under this section, creditors whose debts amount to sums not exceeding ten pounds shall be reckoned in the majority in value, but not in the majority in number; and the value of the debts of secured creditors shall, as nearly as circumstances admit, be estimated in the same way, and the same description of creditors shall be entitled to vote at such general MEETINGS as in bankruptcy."

(No similar provision.)

"The debtor, unless prevented by sickness or other cause satisfactory to such meetings, shall be present at both the meetings at which the extraordinary resolution is passed, and shall answer any inquiries made of him; and he, or if he is so prevented from being at such MEETINGS, some one on his behalf, shall produce to the meetings a statement showing the whole of his assets and debts, and the names and addresses of the creditors to whom such debts respectively are due."

"The extraordinary resolution, together with the statement of the debtor as to his assets and debts, shall be presented to the registrar, and it shall be his duty to inquire whether such resolution has been passed in the manner directed by this section; and if satisfied that it has been so passed, he shall forthwith register the resolution and statement of assets and debts; but until such registration has taken place, such resolution shall be of no validity; and any cred-

sented as to the due passage of the original resolution, the confirmatory signatures, and what is for the best interest of all concerned. *Ib.*

best interest of all concerned, cause such resolution to be recorded and statement of assets and debts to be filed; and until such record and filing shall have taken place, such resolution shall be of no validity. And any creditor of the debtor may inspect such record and statement at all reasonable times."

"The creditors may, by resolution passed in the manner and under the circumstances aforesaid, add to, or vary the provisions of, any composition previously accepted by them, without prejudice to any persons taking interests under such provisions who do not assent to such addition or variation. And any such additional resolution shall be presented to the court in the same manner, and proceeded with in the same way and with the same consequences, as the resolution by which the composition was accepted in the first instance."

"The provisions of a composition, accepted by such resolution in pursuance of this section, shall be binding on all the creditors whose names and addresses, and the amounts of the debts due to whom, are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed, but shall not affect or prejudice the rights of any other creditors."

"Where a debt arises on a bill of exchange or promissory note, if the debtor shall be ignorant of the holder of any such bill of exchange or promissory note, he shall be required to state the amount of such bill or note, the date on which it falls due, the names of the acceptor and of the person to whom it is payable, and any other particulars within his knowledge respecting the same; and the insertion of such particulars shall be deemed a sufficient description by the debtor in respect to such debt.

"Any mistake made inadvertently by a debtor in the statement of his debts may be corrected upon reasonable notice, and with the consent of a general meeting of his creditors."

"Every such composition shall, subject to priorities declared in said act, provide for a *pro rata* payment or satisfaction, in money, to the creditors of such debtor, in proportion to the amount of their unsecured debts, or their debts in respect to which any such security shall have been duly surrendered and given up."

"The provisions of any composition made in pursuance of this section may be enforced by the court, on motion made in a summary manner, by any person interested, and on reasonable notice; and any disobedience of the order of the court made on such motion shall be deemed to be a contempt of court."

"Rules and regulations of court may be

itor of the debtor may inspect such statement at prescribed times, and on payment of such fee, if any, as may be prescribed."

"The creditors may, by an extraordinary resolution, add to or vary the provisions of any composition previously accepted by them, without prejudice to any persons taking interests under such provisions who do not assent to such addition or variation; and any such extraordinary resolution shall be presented to the registrar in the same manner and with the same consequences as the extraordinary resolution by which the composition was accepted in the first instance."

"The provisions of a composition, accepted by an extraordinary resolution in pursuance of this section, shall be binding on all the creditors whose names and addresses, and the amount of the debts due to whom, are shown in the statement of the debtor produced to the MEETINGS at which the resolution has passed, but shall not affect or prejudice the rights of any other creditors."

"Where a debt arises on a bill of exchange or promissory note, if the debtor is ignorant of the holder of any such bill of exchange or promissory note, he shall be required to state the amount of such bill or note, the date on which it falls due, the name of the acceptor or person to whom it is payable, and any other particulars within his knowledge respecting the same; and the insertion of such particulars shall be deemed a sufficient description of the creditor of the debtor in respect of such debt; and any mistake made inadvertently by a debtor in the statement of his debts may be corrected after the prescribed notice has been given, with the consent of a general meeting of his creditors."

(No similar provision.)

"The provisions of any composition made in pursuance of this section may be enforced by the court on a motion made in a summary manner by any person interested; and any disobedience of the order of the court made on such motion shall be deemed to be a contempt of court."

"Rules of court may be made in relation to

4. **IBID. — WHO MAY BE HEARD.** — None but unsecured creditors can be heard at the hearing. *Semble*, that a secured creditor, who does not release his security at or before the first meeting, cannot be heard. *Ib.*

5. **IBID. — PASSAGE OF RESOLUTION. — DEBTOR.** — Notice to the creditors having been given, the required number of unsecured creditors assembled at the first meeting called may pass the resolution. If a secured creditor wishes to vote he must first relinquish his security. The debtor must appear and submit the statement required. As no other formal meeting of the creditors is required, he is not bound to appear at the hearing, to again submit his statement. *Ib.*

6. **IBID. — HEARING. — WHAT COURT MUST DECIDE.** — The resolution purporting to have been previously passed, together with the debtor's statement, having been presented to the court, a hearing will be ordered on notice. At this hearing it must be decided whether such resolution was duly passed and the needed confirmatory signatures obtained, and, if proved to the satisfaction of the court, the court must then be satisfied that the terms, &c., are for the best interest of all concerned. *Ib.*

7. **IBID. — SIGNATURES TO RESOLUTION.** — It is not necessary that the confirmatory signatures shall be attached to the resolution at the first meeting; but they must be attached before, or at, the hearing. They are essential to make the resolution operative. *Ib.*

8. **IBID. — MEETING TO VARY ORIGINAL PROPOSITION. — WHEN MUST BE HELD.** — It is the intent of the bankrupt act that a meeting for the purpose of adding to or varying the original proposition should follow the recording, &c., of the former resolution. But, *semble*, that if after the first meeting, and before the hearing, the debtor agrees to enlarge his offer, the court may inquire into it. The proposed advance in the percentage is only demonstrative of the fact that the original proposition, whether confirmed or not by the needed signatures, is not for the best interest of the creditors. *Ib.*

9. **IBID. — CREDITOR'S NAME ON LIST. — EVIDENCE.** — The fact that a debtor has placed the name of a creditor on his list does not, *primæ facie*, establish that he is a creditor. The creditor must prove himself to be such in the formal manner required by the statute and the general

made in relation to proceedings of composition herein provided for, in the same manner and to the same extent as now provided by law in relation to proceedings in bankruptcy."

"If it shall at any time appear to the court, on notice, satisfactory evidence, and hearing, that a composition under this section cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the court may refuse to accept and confirm such composition, or may set the same aside; and in either case, the debtor shall be proceeded with as a bankrupt, in conformity with the provisions of law, and proceedings may be had accordingly; and the time during which such composition shall have been in force shall not, in such case, be computed in calculating periods of time prescribed by said act."

proceedings on the occasion of the acceptance of a composition by an extraordinary resolution of creditors, in the same manner and to the same extent and of the same authority, as in respect of proceedings in bankruptcy."

"If it appear to the court, on satisfactory evidence, that a composition under this section cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the court may adjudge the debtor a bankrupt, and proceedings may be had accordingly."

orders. In involuntary proceedings, however, the petitioning creditors, on whose motion an order to show cause has been issued, are not bound to prove anew, and in another and more formal manner, that they are such creditors, at a meeting for composition. *Ib.*

10. *IBID.* — *THE REGISTER IS AN OFFICER* of the court, and as such he cannot act independently of its judgments or decrees, but must take notice of them. *Ib.*

11. *IBID.* — *ATTORNEY APPEARING FOR CREDITOR. — DISPUTE. — PROCEDURE.* — A duly authorized attorney appeared before the register at a composition meeting and offered to vote, as representing a creditor under a power previously given. At the same time another person, claiming to be an attorney, also appeared and produced a telegram which he stated he had just received from the principal revoking the former power, and requesting him to act in his place. *Held*, that it was the duty of the register to have deferred action until he could have examined, to his satisfaction the proofs of the revocation and new appointment. *Ib.*

12. *IBID.* — *ATTORNEY. — EVIDENCE OF AUTHORITY TO REPRESENT CREDITOR.* — When an attorney, duly admitted to practise in this court, appears before the register to represent a person in interest, he must be accepted as such, unless some one puts him to proof by a rule therefor to show his authority. All others must show formal powers of attorney as prescribed by the general orders. *Ib.*

13. *IBID.* — *EFFECT OF OMISSION OF ASSETS IN STATEMENT.* — The fact that some individual assets were omitted in the statement at the first meeting does not render the action taken thereat void. It is for the court to decide, in the light of the facts, upon the alleged concealment of assets, and upon the failure to name all of the creditors. *Ib.*

14. *IBID.* — *DILIGENCE REQUIRED OF CREDITORS.* — While creditors should have the amplest opportunity to determine their action at each stage of the case, they must be held to the proper measure of diligence. If the provisions of the bankrupt act are to be so administered as to promote dilatory motions, its beneficence will disappear. *Ib.*

BILLS AND NOTES.

1. *ADDITION OF NAME OF ANOTHER MAKER WITHOUT CONSENT OF ORIGINAL MAKER.* — After the execution and delivery of a promissory note by M., and without his knowledge or consent, it was signed by J. In an action against both by an indorser: *Held*, (1.) That the adding the name of another maker to a bill or note is a material alteration, such as will discharge the original parties not consenting, without regard to whether the alteration is injurious or beneficial to them, and that M. was discharged; (2.) That J. became thereby the maker of a new note, and that the discharge of the other maker was sufficient consideration to support his promise, the law presuming that he knew that the effect of his signature would be to discharge M. *Dickerman v. Miner*, S. C. Iowa, Cent. L. J., January 5, 1877.

2. *ALTERATION OF NOTE BY FILLING BLANKS. — RIGHT OF BONA FIDE HOLDER.* — In suit against the indorser on a promissory note, the defence being an unauthorized alteration, it appeared that in the bottom line, at the

end of the note, was the printed form, "For value received," without a printed blank following it, in which to insert rate of interest (as *e. g.* "with interest from — at the rate of — per cent. per annum"); but that in the blank space, commencing on the line with and directly following the words, "Value received," and running obliquely upward to avoid the signature, were written, after the paper left defendant's hands, the words, "With interest at the rate of ten per cent. per annum after maturity." Nothing in the color of the ink used in the inserted clause would readily excite suspicion. It was *held* that, although the note did not present a glaring case of alteration, yet enough appeared to authorize the court, under appropriate instructions, to leave to the jury the question whether the note was altered in such a manner as to put the plaintiff on inquiry at the time of his purchase.

In a case where a note, framed on a printed blank, was complete at the time it left the hands of the party sought to be charged, but was so printed as to give an apparent authority to fill a blank space occupying the same position relative to the body of the note that an interest clause usually does, and the space left furnished ample room for inserting such clause, and the space was not filled in a way to attract observation, the court strongly inclined to the opinion that the defendant would be bound to an innocent holder. *Iron Mountain Bank v. Armstrong*, S. C. Mo., Am. Law Reg., December, 1876.

CHATTEL MORTGAGE.

1. SEIZURE UNDER CHATTEL MORTGAGE WHERE IDENTITY IS LOST. — A chattel mortgage on a stock of goods allowed of their disposal in the usual course of trade, but stipulated that if the stock was not kept up to a certain amount as security for the mortgagees, the latter might enter. On breach of this condition a seizure and sale to the amount of the mortgage debt was sustained against subsequent purchasers with notice, though the identity of the goods had been nearly destroyed. *Leland v. Colver*, S. C. Mich., Cent. L. J., January 5, 1877; Mo. West. Jur., January, 1877.

2. MORTGAGED CHATTELS AS A TRUST FUND. — A constantly changing stock of goods, subject to a chattel mortgage, is like a trust fund, which equity will pursue into reinvestments so long as it can be identified; subsequent purchasers with notice are in the position of trustees. *Ib.*

3. INSURANCE OF MORTGAGED CHATTELS. — Where a covenant to insure mortgaged chattels for the mortgagee's benefit is not kept, the mortgagee can insure, and add the premium, if reasonable, to his debt. *Ib.*

CONSTITUTIONAL LAW.

TAXATION OF PROPERTY OF CORPORATIONS. — RAILROAD, ETC. — The act of the Iowa Legislature, approved April 6, 1872, providing for the assessment of railroad property by the census board of the state, and the apportionment of such assessed value among the several counties, townships, &c., on the basis of the number of miles in each, is not an injunction of the constitutional provision that the property of all corporations for

pecuniary profit shall be subject to taxation the same as that of individuals. *City of Dubuque v. Chicago, &c., R. R. Co.*, S. C. Iowa, West. Jur., December, 1876.¹

CONTRACT.

• AGREEMENT BY RAILROAD COMPANY THAT TELEGRAPH COMPANY SHALL HAVE EXCLUSIVE RIGHT TO OPERATE LINE FOR TWENTY-FIVE YEARS. — A contract made for sufficient consideration between a telegraph company and a railway company, stipulating that the telegraph company shall have for twenty-five years the exclusive right to construct and operate a telegraph line over the track and right of way of the railway company, is not void as against public policy, but is valid, and an attempted breach of the contract will be restrained by injunction. *Western Union Tel. Co. v. At. & Pac. Tel. Co.*, D. C. Hamilton Co. Ohio, Am. Law Rec., January, 1877.

DAMAGES.

See STREET RAILWAY.

DEED.

PROPERTY CONVEYED TO WIFE WITH KNOWLEDGE OF PARTY LENDING PURCHASE MONEY. — Property was conveyed directly to A's wife, A borrowing part of the money to pay for it from B. *Held*, that if B loaned the money with full knowledge that the deed had been executed to A's wife, the land in her hands could not be made to pay the debt her husband had incurred in its purchase. *Thompson v. Thompson*, S. C. Pa., Leg. Int., December 29, 1876.

GIFT.

See TRUSTS.

HOMESTEAD EXEMPTION.

WATERCRAFT. — BOAT FURNITURE. — In proceedings against a boat, by name, under the watercraft laws of a state, upon final process against the craft, neither the owner nor his wife is entitled, under the homestead

¹ Judge ROTHROCK, writing for the court, uses the following language: "The objection made to the act in question is not that by its provisions any portion of the property escapes taxation of any kind. The act itself requires that the assessment shall be made at a cash value, and when thus made, it is liable to the same tax as the property of individuals. For example, the city of Dubuque may levy municipal taxes to the same extent on the amount apportioned to it, as it may upon the property of individuals.

"That it is within the power of the legislature to fix the *situs* of property for the purpose of taxation, we have no doubt. The question then remains must all property be assessed and

valued by the same officers, or is it provided by the Constitution that all property must be taxed by the same method.

"In our opinion the true meaning and intent of the constitutional provision in question is, that all property, whether owned by corporations or individuals, shall be equally burdened with taxation, and that the legislature may adopt different methods of ascertaining values, adapted to the various peculiarities of the property. This has always been recognized as proper. And the power of the legislature to fix the *situs* of property for the purposes of taxation is not confined to personal property alone."

BECK and ADAMS, JJ., dissented.

laws, to select and hold the craft, its apparel, or furniture, exempt from execution. *Johnson v. Ward*, S. C. Ohio, Mo. West Jur., January, 1877.

HUSBAND AND WIFE.

See DEED.

INJUNCTION.

See STREET RAILWAY.

INSURANCE.

1. TAXATION. — THE PREMIUM RESERVE FUND OF AN INSURANCE COMPANY is the amount set apart by the company, for the payment of losses accruing from deaths of its policy holders. The amount of this fund depends upon the amount of the policies outstanding, and is the present value of such policies, or, what is equivalent thereto, the sum that is required to safely insure them. Under a statute which declares that "the indebtedness of the tax-payer shall be deducted, and the excess only shall be taxed," the premium reserve fund of an insurance company is exempt from taxation. *Alabama Gold Life Ins. Co. v. Loth*, S. C. Ala., Ins. L. J., December, 1876.

2. WHERE, THROUGH A MISAPPREHENSION, AN AGENT ISSUES A POLICY ON ANOTHER BUILDING THAN THAT INTENDED and applied for by the insured, equity cannot reform the contract to apply to the building intended. *Mead v. Westchester Fire Ins. Co.*, Ct. App. N. Y., Ib.

3. ABORTION. — WHERE DEATH RESULTED FROM an illegal operation voluntarily submitted to by insured to produce abortion: *Held*, that public policy would preclude the company from insuring against the consequence of such an act, and no recovery could be had. *Hatch v. Mut. Life Ins. Co.*, S. C. Mass., Ib.

4. PLEADING AVERMENT OF INTEREST. — Where the insurance was taken out by H. upon his own life, payable if alive at the end of twenty-three years, or for the benefit of his father in the event of previous death. *Held*, in an action by the latter, an averment of interest was unnecessary in a declaration which set out the policy. *Mass. Mut. Life Ins. Co. v. Kellogg*, S. C. Ill., Ib.

See CHATTEL MORTGAGE, 3.

MANDAMUS.

TO COMPEL OVERSEERS OF POOR TO RECEIVE PAUPER. — Mandamus is the proper remedy to compel the overseers of the poor of a township to receive and maintain a pauper under an order of removal unappealed from. *Commonwealth v. Overseers of the Poor, &c.*, S. C. Pa., Leg. Int., December 15, 1876.

MORTGAGE.

See NATIONAL BANK.

NATIONAL BANK.

1. MORTGAGE. — SALE OF MORTGAGED PREMISES. — ULTRA VIRES. — A mortgage given to a national bank to secure a preëxisting debt by the mortgagor, and to secure a future loan to him, is as to the latter *ultra vires*. If the mortgaged premises be sold, the proceeds arising therefrom must be applied in discharge of such preëxisting debt, notwithstanding such proceeds arose from a sale by the sheriff. *Woods v. People's Nat'l Bank of Pittsburg*, S. C. Pa., Leg. Int., December 29, 1876.

2. AN INDORSER OF NOTES HELD BY A NATIONAL BANK, SECURED BY A MORTGAGE, has a right to have the proceeds arising from a judicial sale of the mortgaged premises by the bank applied to the payment of such notes in his relief. *Id.*

RAILROAD.

See CONTRACT.

RECEIVER.

RIGHT TO SUE IN JURISDICTION OF COURT OTHER THAN THAT BY WHICH APPOINTED. — A receiver appointed by a state court, who has reduced property to possession in his own state, may maintain replevin for such property in another state. *Cagill v. Wooldbridge*, S. C. Tenn., Cent. L. J., January 5, 1877.

STREET RAILWAY.

ABUTTING OWNERS. — INJUNCTION. — DAMAGES. — Where, by the charter of a city, its local authorities are vested with exclusive control over the streets, and those authorities grant permission to lay down railway tracks along a street, the owners or occupants of property fronting on such street cannot enjoin the laying of such tracks, nor be allowed any damages or compensation for such use of a street, when no unnecessary damage is inflicted. *Chicago, Burlington, & Quincy R. R. Co. v. McGinnis*, S. C. Ill., Cent. L. J., January 5, 1877.

TAXATION.

See CONSTITUTIONAL LAW ; INSURANCE, 1.

TELEGRAPH COMPANY.

See CONTRACT.

TRUSTS.

DEPOSIT IN SAVINGS BANK. — VOLUNTARY TRUST. — HOW TRUST CONSTITUTED, ETC. — B. deposited in a savings bank certain money in his own name as trustee for R. and gave the bank book to R., who was his step-daughter ; R. returned the book to B., in whose control it remained until his death. In an equity suit by R. against the administrator of B.,

claiming the deposit as trust funds held by B. for R.: *Held*, that the trust was completely constituted. *Held*, further, that the trust being constituted, the fact that it was voluntary was no reason for refusing relief. To constitute a trust it is enough if the owner of property conveys it to another in trust, or if the owner of personalty unequivocally declares, either orally or in writing, that he holds it *in presenti* in trust for another. *Ray v. Simmons*, S. C. R. I., Am. Law Reg., December, 1876.

See ADMINISTRATOR.

ULTRA VIRES.

See NATIONAL BANK.

SUPREME COURT OF ILLINOIS.

[JUNE, 1876.]

IMPRISONMENT FOR FAILURE TO COMPLY WITH DECREE FOR PAYMENT
OF ALIMONY.

BLAKE v. THE PEOPLE.

Decrees for the payment of alimony are governed by the same rules as other decrees for the payment of money.

Hervey, Anthony & Galt, for appellant.

J. K. Dow, contra.

OPINION by SCOTT, C. J. Shortly stated, the case made by this record is, that on the eighth day of February, 1875, the court entered an order in the case of Christine Blake against Barnum Blake, then pending for divorce, that defendant should pay the complainant \$75 forthwith, and the sum of \$65 on the first day of every month next following during the pendency of the suit, for temporary alimony, also pay the further sum of \$150 to her solicitors within ten days from that date, as a reasonable retainer and counsel fee, and that defendant refund to her the sum of \$6, costs advanced, and that in case of default in the payment of such sums of money, or any part thereof, the same should be collected in accordance with the usual practice in courts of chancery in such cases.

An affidavit having been filed showing defendant had not complied with the decree of the court in that particular, and that there was then due, under the decree, the sum of \$126, and that another monthly instalment would mature on the next day, thereupon on the first day of June, 1875, on motion of complainant's solicitors, the court entered an order that defendant be arrested and brought into court for a failure to make payments of the several instalments of alimony and solicitors' fees as he had been directed to do by the original decree.

On being brought into court, defendant first entered a motion that he

might be discharged from arrest for the reason he was then, and had been, pecuniarily unable to comply with the decree of the court for the payment of the several sums of money specified; and secondly, for a modification of the decree allowing alimony, that the instalments to be paid might be so reduced that he could thereafter pay them. Both motions were based upon affidavits in which were given in detail the facts relied upon in support of the motions. Counter affidavits having been presented and considered, the court overruled both motions, and ordered defendant to pay instanter the amount due under the original decree, and in default of such payment he be remanded to the custody of the sheriff, to be safely kept until he should comply with the order, or be otherwise discharged.

Under our statutes there are several modes in which decrees in chancery may be executed or enforced. When there shall be no direction that a master in chancery or commissioner execute a decree, the same may be carried into effect by execution, or other final process, according to the nature of the case, or the court may, if necessary, direct an attachment to be issued against the party disobeying such decree, and may fine or imprison him, or both, in the discretion of the court, and may also direct a sequestration for disobedience to any decree. R. S. 1874, p. 203, sec. 47.

In divorce cases the court is authorized to require the husband to pay the wife such sums of money as may enable her to prosecute or defend the suit, and when it is just and equitable, may allow her alimony pending the litigation, and may enforce the payment in any "manner consistent with the rules and practice of the court." R. S. 1874, p. 421, secs. 15, 18.

It is apprehended that decrees for alimony may be enforced by execution or other final process, or other decrees in chancery, or in any other mode consistent with the practice in the courts of chancery. But as cumulative remedies, no doubt the court may enforce decrees for alimony, either by sequestration of real or personal estate, by attachment against the person, by fine or imprisonment, or both, in the discretion of the court, as other decrees in chancery may be enforced.

That courts possess power to commit as for contempt, to compel obedience to decrees for the payment of alimony, has been recognized by this court in a number of cases. *Buck v. Buck*, 60 Ill. 105; *O'Callaghan v. O'Callaghan*, 69 Ill. 552; *Dinet v. The People*, Sept. T. 1873. In *Buck v. Buck*, the court committed defendant for disobedience to a decree for alimony and maintenance, and its action was affirmed on appeal.

While this extraordinary power is conceded to rest in the courts, it is nevertheless subject to this limitation imposed by the Constitution, that a party may not be imprisoned except in cases where it shall appear he has the pecuniary ability to enable him to comply with the decree, and his disobedience is wilful. In *O'Callaghan v. O'Callaghan*, it was said: "The court is empowered to punish wilful obstinacy in such cases by imprisonment, but we think the spirit of our Constitution forbids that the pecuniary inability of the party, not resulting from his fraudulent conduct to produce that condition, cannot be punished as a contempt by imprisonment."

Where the neglect or the refusal to perform the decree is not from mere contumacy, but from the want of means, the result of misfortune, not

induced by any fraudulent conduct on the part of defendant, the party will be compelled to adopt some mode other than imprisonment to enforce the decree consistent with the practice in the courts, either by execution or by other final process, or by sequestration of real or personal estate, or by the exercise of such other powers as pertain to courts of chancery, and which may be necessary to the attainment of justice. It is not perceived in what respect decrees for alimony are different from other decrees for the payment of money. Imprisonment for non-compliance therewith, unless wilful, or unless upon a refusal of defendant upon proper demands made to deliver up his estate in satisfaction of the decree, is within the inhibition of the Constitution against imprisonment for debt.

The case at bar comes within the rule declared. It appears from the affidavit in the record defendant's refusal to comply with the decree of the court was not wilful, but resulted solely from his pecuniary inability, and that, under our former decisions, was sufficient to entitle him to be discharged from arrest. Detailed statements of defendant's financial condition were given, from which it appears he had no means and no income from which he could discharge the decree. This condition was not the result of any fraudulent conduct on his part, but was produced by misfortunes in commercial transactions. There is nothing in the record that disproves or even contradicts defendant's account of his financial condition. It must therefore be regarded as a fair and candid exposition of his monetary affairs. Defendant discloses that he has real estate and perhaps personal property, but it is all heavily incumbered. A full exhibit of all his property, real and personal, is made, that it may be subjected to the payment of alimony under the decree, in any manner known to the law or consistent with the practice in the court. This is all he can do, and having offered to surrender his property, such as he has, he is entitled to be discharged from arrest.

The judgment will be reversed and the cause remanded, with direction to the court to enter an order discharging defendant.

NOTES OF NEW BOOKS.

CASES DETERMINED IN THE CIRCUIT COURTS OF THE UNITED STATES FOR THE FIFTH CIRCUIT. Reported by Wm. B. Woods, the Circuit Judge. Vol. II. Chicago: Callaghan & Co. The second volume of Judge Woods' series fully sustains the high character of the first. The cases are in almost every instance of substantial value, and are reported with conscientious care. The learned reporter has brought to the execution of his work the same industry and ability that have characterized a large proportion of his opinions. There is every evidence of care, and much that tends to give the volume individuality. It is a thoroughly good book.

Of the subjects discussed, Equity Practice in the Federal Courts, Railway and Municipal Bonds, Railway Mortgages, Receivers, Admiralty, and Bankruptcy have received especial attention. The volume embraces one hundred and twenty cases, with a Table of Cases Cited. There is, perhaps, no series of federal reports that commends itself more highly to the profession than that of Judge Woods.

A TREATISE ON THE LAW OF FIXTURES. By Marshall D. Ewell. Chicago: Callaghan & Co. The above purports to be a comprehensive treatise upon the Law of Fixtures.

It is at least nearer comprehensive than any earlier work, and is beyond question to be preferred to any other.

TRIAL BY JURY, including questions of Law and Fact. By John Proffatt. San Francisco: Sumner, Whitney, & Co.; New York: Hurd, & Houghton; Cambridge: The Riverside Press. The purpose of this volume is "to give the law applicable to all proceedings connected with the jury from its selection to its discharge." The analysis of the subject is natural, and its treatment open to no well-founded objection. The book cannot fail to prove valuable and convenient to the average practitioner. It is accompanied by a Table of Cases Cited and is admirably printed and bound.

REPORTS OF SELECTED CIVIL AND CRIMINAL CASES DECIDED IN THE COURT OF APPEALS OF KENTUCKY. By W. R. D. Bush, Reporter. Vol. XI. Louisville: Jno. P. Morton & Co. The fact that the Kentucky Reports are made up of Selected Cases is a circumstance that commends them very highly. The present volume is fairly up to the standard of those of earlier date. Perhaps every case it contains may be said to be well considered. The volume merits favorable mention, too, as being "full measure." It contains over eight hundred pages without the semblance of "padding" of any kind.

A TREATISE UPON THE U. S. COURTS AND THEIR PRACTICE. By Benj. Vaughan Abbott. Third edition. Vol. I. New York: Ward & Peloubet.

OUTLINE OF AN INTERNATIONAL CODE. By David Dudley Field. Second Edition. New York: Baker, Voorhis, & Co.

THE AMERICAN LAW TIMES.

NEW SERIES. — MARCH, 1877. — VOL. IV., No. 3.

NOTES OF OPINIONS, DECISIONS, AND ORDERS

OF THE

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1876.

Monday, January 15, 1877.

No. 146. *Milton Humes, assignee, &c., appellant, v. Narcisse Scruggs et al.* Appeal from the District Court of the United States for the Northern District of Alabama. Mr. Justice Hunt delivered the opinion of the court, reversing the decree of the said district court, with costs, and remanding the cause with directions to enter a decree for the complainant in conformity with the opinion of this court. This cause involved questions of fact only.

No. 487. *The Lake Superior & Mississippi Railroad Co., appellant, v. The United States;* No. 673. *The Atchison, Topeka & Santa Fe Railroad Co., appellant, v. The United States.* Appeals from the Court of Claims. Mr. Justice Bradley delivered the opinion of the court, reversing the judgments of the said court of claims, and remanding the causes with directions to enter judgments in favor of the claimants, in conformity with the opinion of this court. Dissenting: Mr. Justice Miller, Mr. Justice Clifford, Mr. Justice Swayne, and Mr. Justice Davies.

It is decided in these cases that land-grant railroads are not bound to transport the troops and property of the United States free of charge; that they are only to allow the government the free use of their tracks in return for the grants; and that they are entitled to compensation for all such transportation they have performed, excepting the carrying of the mails, subject to a fair deduction for the use of their several roads. The general course of legislation on the subject of railroads is reviewed at length, and the conclusion is, that it demonstrates the fact that in the early history of railroads it was very generally supposed that there could be public highways in fact as well as in name. In view of this fact it is thought that the conclusion is not to be resisted, when construing a legislative declaration to the effect that a particular railroad shall be a public highway, that the meaning is, that it shall be open to the use of the public with their own vehicles; and that when Congress, in granting lands in aid of such a road, declared that it should be and remain a public highway for the use of the government, it only meant that the government should have the right to use the road, but not that it should have the right to require its transportation to be performed by the railroad company, and that when the right to use the road is granted, "free from all toll or other charge for the transportation of any property or troops of the United States," it only means that the government shall not be subject to any toll for such use of the road.

No. 136. *Henry Hentz et al., appellants, v. The Steamship Idaho, &c.* — Appeal from the Circuit Court of the United States for the Eastern District of New York. Mr. Justice Strong delivered the opinion of the court, affirming the decree of the said circuit court, with costs. The rule is announced in this cause to be that a common carrier may show as an excuse for non-delivery, pursuant to his bill of lading, that he has delivered

the goods upon demand to the true owner. The opinion will appear in full in the Law Times Reports for April.

No. 135. *Nathan C. Russell, appellant, v. Samuel Dodge, Sr. and Jr.* Appeal from the Circuit Court of the United States for the Northern District of New York. Mr. Justice Field delivered the opinion of the court, affirming the decree of the said circuit court, with costs. The points decided in this cause are as follows:—

1. Where a reissued patent is granted upon a surrender of the original, for its alleged defective or insufficient specification, such specification cannot be substantially changed in the reissued patent, either by the addition of new matter or the omission of important particulars, so as to enlarge the scope of the invention as originally claimed. A defective specification can be rendered more definite and certain so as to embrace the claim made, or the claim can be so modified as to correspond with the specification; but, except under special circumstances, this is the extent to which the operation of the original patent can be changed by the reissue.

2. Where the patent was for a process of treating bark-tanned lamb or sheep-skin by means of a compound, in which heated fat liquor was an essential ingredient, and a change was made in the original specification by eliminating the necessity of using the fat liquor in a heated condition, and making in the new specification its use in that condition a mere matter of convenience, and by inserting an independent claim for the use of fat liquor in the treatment of leather generally, the character and scope of the invention as originally claimed were held to be so enlarged as to constitute a different invention.

3. The action of the commissioner of patents in granting a reissue within the limits of his authority is not open to collateral impeachment; but his authority being limited to a reissue for the same invention, the two patents may be compared to determine the identity of the invention. If the reissued patent, when thus compared, appears on its face to be for a different invention, it is void, the commissioner having exceeded his authority in issuing it.

4. The case of *Klein v. Russell*, reported in the 19th of Wallace, is stated and qualified.

No. 931. *Heyman Osterberg, appellants, v. The Union Trust Company of New York et al.* Appeal from the Circuit Court of the United States for the Northern District of Illinois. Mr. Justice Davis delivered the opinion of the court, dismissing the decree of the said circuit court, with costs. The points involved in this appeal are chiefly questions of fact, not of general interest.

No. 661. *Socrates Huff, plaintiff in error, v. C. W. Doyle et al.* In error to the Supreme Court of the State of California. Mr. Justice Miller delivered the opinion of the court, reversing the judgment of the said supreme court, with costs, and remanding the cause, with instructions to affirm the judgment of the district court of the Third Judicial District, county of Alameda. Mr. Justice Davis took no part in the decision. The following are the points decided in this case:—

1. The Act of Congress of July 23, 1866, confirming selections made by the State of California of public lands, divided those claims into two classes; namely, those in which the lands so selected had been surveyed by the United States before the passage of the act, and those in which the surveys were yet to be made.

2. By the second section of the act the selection was to be treated as of the date at which the notice of a former selection was given to the local land officers after the passage of the act, in cases where the surveys had been made before the passage of the act.

3. By the third section, where the surveys had yet to be made, the state had the right to treat her selection made before the passage of the act as a preemption claim, and had the same time allowed to prove it up after the surveys were filed in the local land office.

4. By a fair construction of these provisions, and others of this statute and the Act of March 3, 1853, the exception in the first section confirming these selections of lands "held or claimed under a valid Mexican or Spanish grant" must be determined as of the date when the claimant under a state selection undertakes to prove up his claim after the surveys are made and filed, and within the time allowed thereafter to pre-emptors.

5. If at that time it has been determined, either by a judicial decision or by survey of a confirmed claim, that the land in question is excluded from the Mexican grant, it is subject to the confirmation of the selection made by the state, though within the outboundary of a valid Mexican claim, when originally located under state authority before the surveys were made by the general government.

No. 138. *Peter Lyman, appellant, v. The Steamboat John L. Hasbrouck, &c.* Appeal from the Circuit Court of the United States for the Eastern District of New York. Mr. Justice Clifford delivered the opinion of the court, affirming the decree of the said circuit court, with costs. This was a collision case. The accident took place upon the Hudson, and it appeared that a sloop imprudently crossed the bow of a steamer which was holding the channel of the river. The facts, it is said, clearly showed that the sloop was in fault.

No. 131. *The United States, plaintiffs in error, v. John H. Thompson et al.* In error to the Court of Appeals of the State of Maryland. Mr. Chief Justice Waite delivered the opinion of the court, dismissing the writ of error for the want of jurisdiction. The doctrine, frequently announced, is here again affirmed, that this court will not examine the judgment of a state court merely because the United States is a party.

The court says: "It is not contended that this decision is repugnant to the Constitution or any law or treaty of the United States; but the argument is, that as the check of McFreely & Hopper was not paid, it did not pay their debt. Whether this is so or not does not depend upon any statute of the United States, but upon the principles of general law alone. We have many times held that we have no power to review the decisions of the state courts upon such questions."

No. 171. *Christopher Meyer et al., appellants, v. Stephen Prichard.* Appeal from the Circuit Court of the United States for the Southern District of New York. Mr. Chief Justice Waite delivered the opinion of the court, dismissing the writ of error, with costs. This was a patent case. It appeared that after the appeal had been taken, the appellants, who represented the original patentees, surrendered the patent upon which the suit was brought and obtained a reissue. This fact was conceded. *Per Curiam*: If we should hear the case and reverse the decree below, we could not decree affirmative relief to the appellants, who were the complainants below, because the patent upon which their rights depend has been cancelled. There is no longer any "real or substantial controversy between those who appear as parties to the suit" upon the issues which have been joined, and for that reason the appeal is dismissed.

No. 721. *Mary A. Pearson et al., plaintiffs in error, v. John and Anne Jane Youdall.* Mr. Chief Justice Waite announced the decision of the court, denying the motion to dismiss the writ of error.

No. 855. *William Roemer, appellant, v. Edward Simon et al.* Mr. Chief Justice Waite announced the decision of the court, granting the motion to vacate the order in this case.

Monday, January 22, 1877.

No. 662. *The Board of County Commissioners, County of Leavenworth, plaintiffs in error, v. Robert A. Barnes.* In error to the Circuit Court of the United States for the District of Kansas. Mr. Justice Hunt delivered the opinion of the court, affirming the judgment of the said circuit court, with costs and interest. This was an action upon certain bonds issued by the county named, in the month of July, 1865. The validity of the bonds is here sustained, the court strongly intimating that there was no ground whatever for the writ of error.

No. 764. *James M. Mackie et al., plaintiffs in error, v. Benjamin S. Story.* In error to the Circuit Court of the United States for the District of Louisiana. Mr. Justice Bradley delivered the opinion of the court, affirming the judgment of the said circuit court, with costs.

Norman Story, of the city of New Orleans, now deceased, made his will, dated April 24, 1867, the third paragraph of which was in these words: "I will and bequeath to Henry C. Story and Benj. S. Story all properties I die possessed of, to be divided equally between them." The legatees were brothers of the deceased, and Henry died before him, leaving children; Benjamin survived. The question in this case is whether the whole legacy accrued to Benjamin, the survivor, or whether only one half of it did so, leaving the deceased intestate as to the other half? The court below decided that the legacy was a conjoint one, and that by the right of accretion the whole of it accrued to Benjamin; and that view is here affirmed.

No. 9. Original. *Ex parte Robert L. Cutting.* Mr. Chief Justice Waite delivered the opinion of the court, denying the petition. This was a petition that a mandamus issue from this court to the judges of the circuit court for the Eastern District of Missouri, commanding them, or one of them, to grant petitioners an appeal to this court from the decrees of that court, and to accept bond to act as a supersedeas, and that such appeal

be allowed as of the date when said application was made originally in said court, or when it was rejected, as this court shall order.

"To entitle the petitioners to the writ asked for in this case," says the chief justice, "they must show that they have a clear right to an appeal, which has been refused by the circuit court. The office of a mandamus is to compel the performance of a plain and positive duty. It is issued upon the application of one who has a clear right to demand such a performance and who has no other adequate remedy. It is never granted in anticipation of an omission of duty, but only after actual default." The facts, it is held, do not bring the present case within the rule.

No. 145. *The Atlantic & Pacific Railroad Co., plaintiffs in error, v. H. S. Hopkins.* In error to the Circuit Court of the United States for the District of Kansas. Mr. Chief Justice Waite delivered the opinion of the court, affirming and modifying the judgment of the said circuit court. The case turned upon a question of practice under the Code of the State of Kansas, this court holding that the court below should have followed the state practice.

No. 121. *William W. Bond et al., plaintiffs in error, v. John M. Moore.* In error to the Supreme Court of the State of Tennessee. Mr. Chief Justice Waite delivered the opinion of the court, affirming the judgment of the said supreme court, with costs. The only question in this case had relation to the effect of the President's proclamation of June 13, 1865 (13 Stat. 763), upon the rights and duties of parties to commercial paper, residing respectively during the late civil war in Tennessee and New Orleans, when the paper matured after the occupation of New Orleans by the national forces and before the date of the proclamation, which has been already settled by *Matthews v. McStea*, 91 U. S. 7.

No. 147. 199 barrels of whiskey, *Charles Andre, claimant, appellant, v. The United States*; No. 148, 100 barrels of whiskey, *Charles Andre claimant, appellant, v. The United States.* Appeals from the Circuit Court of the United States for the Eastern District of Texas. Mr. Chief Justice Waite delivered the opinion of the court, affirming the decision of the said circuit court in both of these causes. These were internal revenue cases involving only questions of fact.

No. 695. *The Missouri Valley Life Insurance Co., plaintiff in error v. Augusta S. Smith.* In error to the Circuit Court of the United States for the District of Kansas. Mr. Chief Justice Waite announced the decision of the court, affirming the judgment of the said circuit court, with costs.

No. 540. *The Western Union Telegraph Co., plaintiff in error, v. Jonathan Rogers.* In error to the Circuit Court of the United States for the District of Nebraska. Mr. Chief Justice Waite announced the decision of the court, dismissing the writ of error in this cause for the want of jurisdiction.

No. 653. *The Board of County Commissioners of Marion County, plaintiffs in error, v. Aaron Clarke.* In error to the Circuit Court of the United States for the District of Kansas. Mr. Justice Clifford delivered the opinion of the court, affirming the judgment of the said circuit court, with costs and interest. This was a cause involving the liability of the plaintiffs in error upon certain bonds. The defences were interposed apparently only to cause delay. No points of moment were discussed.

No. 159. *Joseph W. Stanton et al., plaintiffs in error, v. James H. Embry, administrator.* In error to the Supreme Court of the District of Columbia. Mr. Justice Clifford delivered the opinion of the court, affirming the judgment of the said supreme court, with costs and interest. Services were rendered by Robert J. Atkinson, in his lifetime, as attorney for the defendants in prosecuting a claim, in their behalf, against the United States, before the accounting officers of the treasury department, and the plaintiff instituted the present suit in the supreme court of the district to recover compensation for those services, including a claim for services rendered by the decedent and by himself, as such administrator in the same case, since the decease of the intestate.

The defence was that the contract was void as against public policy. CLIFFORD, J., writes as follows: "Professional services to prepare and advocate just claims for compensation are as legitimate as services rendered in court in arguing a cause to convince a court or jury that the claim presented, or the defence set up against a claim presented, by the other party ought to be allowed or rejected. Parties in such cases require advocates, and the legal profession must have a right to accept such employment and to receive compensation for their services; nor can courts of justice adjudge such contracts illegal if they are free from any taint of fraud, misrepresentation, or unfairness. By the contract in question the amount of compensation to be paid was not fixed, and in order to enable

the jury to determine what the plaintiff was equitably entitled to recover he called other attorneys and proved what is ordinarily charged in such cases, and the defendants excepted to the ruling of the court in refusing to charge the jury that they should disregard such testimony. Attorneys and solicitors are entitled to have allowed to them for their professional services what they reasonably deserve to have for the same, having due reference to the nature of the service and their own standing in the profession for learning, skill, and proficiency; and for the purpose of aiding the jury in determining that matter it is proper to receive evidence as to the price usually charged and received for similar services by other persons of the same profession practising in the same court."

No. 167. *The President, &c., Insurance Company of North America, plaintiff in error, v. Phebe N. Field.* In error to the Circuit Court of the United States for the Northern District of Illinois. Mr. Chief Justice Waite announced the decision of the court, affirming the judgment of the said circuit court, with costs and interest.

No. 294. *The United States, appellant, v. Manuel J. Garcia et al.* Appeal from the District Court of the United States for the District of Louisiana. Mr. Chief Justice Waite announced the decision of the court, affirming the decree of the said district court in this cause, on the authority of *United States v. Lynde*, 11 Wall. 632.

No. 784. *Germania National Bank et al., appellants, Frank F. Case, receiver.* Mr. Chief Justice Waite announced the decision of the court, denying the motions to dismiss this cause.

No. 333. *J. P. T. Barry, plaintiff in error, v. The Commonwealth of Massachusetts*; No. 525. *James W. McCready, plaintiff in error, v. The Commonwealth of Virginia*; No. 638. *Joseph Shields, plaintiff in error, v. The State of Ohio.* Mr. Chief Justice Waite announced the decision of the court, granting the motion to advance these causes.

Monday, January 29, 1877.

No. 406. *Chester Badger et al., plaintiffs in error, v. The United States, ex rel. Matthew and M. S. Bolles.* In error to the Circuit Court of the United States for the Northern District of Illinois. Mr. Justice Hunt delivered the opinion of the court, affirming the judgment of the said circuit court, with costs. The relators filed their petition for a mandamus against Badger and others, supervisor, town clerk, and justices of the town of Amboy, alleging the recovery of two judgments by them against that town; that the supervisor, town clerk, and three justices of the peace, constituted a board of auditors, whose duty it was to audit and examine town accounts; that a sworn statement of the judgments was presented to the board, but they refused to audit the same; that three of the persons named pretended to resign their offices, and would not perform the duties of the same, but that no other persons have been appointed or elected to succeed them; that the others refused to act or to associate with them, the collector and assessor; that by reason of the acts of the parties the petitioners have been unable to have taxes collected for the payment of their debt; that no provision has been made for its payment, and they pray that a mandamus may be awarded to compel the auditing of the judgments. The defendants admit the resignations stated, and allege that they were accepted by the justices of the town, and that notice thereof was given to the town clerk, who made a minute of the same upon the records of the town, whereby, as they insist, they ceased to be officers of the town. Notwithstanding the resignations the writ was ordered to issue and the order is here affirmed.

No. 904. *The City of Omaha, plaintiff in error, v. Aaron Hammond.* In error to the Circuit Court of the United States for the District of Nebraska. Mr. Justice Miller delivered the opinion of the court, affirming the judgment of the said circuit court, with costs and interest. The defendant in error sued the city of Omaha on a contract for the construction of two public wells in the streets of that city. The contract was in writing, and, by its terms, plaintiff was "to sink and construct two wells, . . . said wells to be circular, twelve feet in diameter, and to be curbed with a brick wall nine inches in thickness, and arched over in a secure and proper manner, the whole to be completed under the supervision, and to the satisfaction, of the chief engineer of the fire department of said city." For this work the city was to pay plaintiff "one hundred dollars for each and every one thousand gallons of water which each of said wells shall be capable of producing, and shall produce, within twenty-four hours, the capacity of said wells to be tested by the chief engineer of the fire department of the city of Omaha aforesaid. And upon the report of said officer being made to the council of said city, showing that the wells are completed and satisfactory, and also showing the amount of water that said well or wells will produce in twenty-four hours, the said party of the first part shall be entitled

to and shall receive from the said party of the second part the said sum, to be paid in city warrants." These extracts, it is said, from the agreement, are all that are necessary to the decision of the case. The plaintiff proved the construction of the wells under the supervision of the engineer, to his entire satisfaction, and his final acceptance of them. But it was also proved that, while the main part of the wells was sunk to the depth of twenty to twenty-three feet of the diameter of twelve feet, the brick curbing of nine inches in thickness, built inside the shaft so sunk, reduced this diameter to ten and a half feet, and that smaller shafts of four or five feet in diameter were sunk below the bottom of the main well to the depth of several feet. These two circumstances constituted the defence of the city. As to both of them, it is here said, the city is concluded by the action of its own officer, the engineer, who was also by the terms of the contract authorized by the parties to it to decide these questions.

No. 166. *The Consolidated Fruit Jar Company, appellants, v. James T. Wright.* Appeal from the Circuit Court of the United States for the Southern District of New York. Mr. Justice Swayne delivered the opinion of the court, affirming the decree of the said circuit court, with costs. No. 114. *William H. Cammeyer et al., appellants, v. John Newton et al.* Appeal from the Circuit Court of the United States for the Southern District of New York. Mr. Justice Clifford delivered the opinion of the court, affirming the decree of the said circuit court, with costs.

These were patent causes which were decided upon questions of novelty. In No. 114, the rule announced in *U. S. v. Burns*, 12 Wall. 252, is approved.

No. 152. *The United States, appellants, v. Charlotte Bostwick, administratrix, &c.;* No. 153. *Charlotte Bostwick, administratrix, &c., appellants, v. The United States.* Appeals from the Court of Claims. Mr. Chief Justice Waite delivered the opinion of the court, reversing the judgment of the said court of claims, and remanding the cause with instructions to render judgment in conformity with the opinion of this court. These appeals involved the construction of a contract of a special character, not of general interest.

No. 797. *The United States, appellants, v. Cyrus C. Clark.* Appeal from the Court of Claims. Mr. Chief Justice Waite announced the decision of the court, remanding the cause for such further proceedings as law and justice may require.

No. 164. *The West Wisconsin Railway Company et al., plaintiffs in error v. D. J. Foley et al.;* and No. 165. *The West Wisconsin Railway Company et al., plaintiffs in error, v. D. J. Foley et al.* In error to the Circuit Court of the United States for the Western District of Wisconsin. Mr. Chief Justice Waite delivered the opinion of the court, affirming the judgments of the said circuit court in these causes, with costs, and \$500 damages in addition to interest.

WAITE, C. J. It is clear that there is no error in this record. The answer does not state facts sufficient to constitute a defence to the action. No counsel have appeared to prosecute the suit, no brief has been filed, and no error assigned. We are entirely satisfied that the case has been brought here for delay, and that it is proper to adjudge "just damages for delay" under the provisions of sec. 1010, Rev. Stat. The only difficulty we have had has been in respect to the amount. Under the old rules the court was sometimes asked to give damages beyond those prescribed by the rule. This was always denied, but so far as we have been able to discover it has never been decided that less could not be given under proper circumstances. "Shall" ought undoubtedly to be construed as meaning "must," for the purpose of sustaining or enforcing an existing right, but it need not be for creating a new one. Neither under the statute nor the rule has a party the legal right to demand a judgment for damages in excess of interest. All is left to the judicial discretion of the court. And this is true as well as to the amount as to the propriety of giving any at all. This being the case, we think the rule may fairly be construed as limiting the amount beyond which we cannot go, but as leaving us at liberty to give less than the full sum in cases where, in our judgment, the circumstances are such as to make it proper to do so. An inflexible rule requiring us to award a certain specified amount or none at all, would oftentimes operate to defeat itself. The object is to discourage frivolous appeals, as well as to compensate to some extent for the loss which results from delay. Oftentimes ten per cent. upon the amount of a judgment might far exceed the loss actually sustained; and in such cases we might decline to award damages at all, if we could not give less, because of the wrong that would be inflicted if we did give them. Thus one of the benefits anticipated from the rule would be lost. Under these circumstances we hold that while, with the rule in force, we cannot award as damages for delay more than ten per cent. upon the amount of the judgment, we may, in the exercise of our discretion, give less.

No. 168. *The Electric Match Company et al., plaintiffs in error, v. The United States.* In error to the Circuit Court of the United States for the Northern District of Illinois. Mr. Chief Justice Waite announced the decision of the court, affirming the judgment of the said circuit court in this cause.

No. 173. *Peter Doyle, Secretary of State, Wisconsin, plaintiff in error, v. State of Wisconsin, ex rel. Drake.* Mr. Chief Justice Waite delivered the opinion of the court, denying the motion to set aside certain proceedings of the supreme court of Wisconsin.

DIGEST OF CASES

PUBLISHED IN EXTENSO IN LATE ISSUES OF AMERICAN LEGAL PERIODICALS.

ABBREVIATIONS.

Albany L. J. — *Albany Law Journal*, Albany, N. Y., WEED, PARSONS & CO.
 Am. Law Rec. — *American Law Record*, Cincinnati, O., H. M. MOOS.
 Am. Law Reg. — *American Law Register*, Philadelphia, Pa., D. B. CANFIELD & CO.
 Cent. L. J. — *Central Law Journal*, St. Louis, Mo., SOULE, THOMAS & WENTWORTH.
 Chicago L. N. — *Chicago Legal News*, Chicago, Ill., CHICAGO LEGAL NEWS CO.
 Ins. L. J. — *Insurance Law Journal*, New York, C. C. HINE, 176 Broadway.
 Int. Rev. Rec. — *Internal Revenue Record*, New York, W. P. & F. C. CHURCH.
 La. L. J. — *Louisiana Law Journal*, New Orleans, La.
 Leg. Chron. — *Legal Chronicle*, Pottsville, Pa., SOL. FOSTER, JR.
 Leg. Int. — *Legal Intelligencer*, Philadelphia, Pa., J. M. POWER WALLACE.
 Mo. West. Jur. — *Monthly Western Jurist*, Bloomington, Ill., T. F. TIPTON.
 N. B. R. — *National Bankruptcy Register*, New York, CAMPBELL & CO.
 Pac. Law Rep. — *Pacific Law Reporter*, San Francisco, Cal., J. P. BOGARDUS.
 Pittsb. L. J. — *Pittsburg Legal Journal*, Pittsburg, Pa., J. W. & J. S. MURRAY.
 W. L. R. — *Washington Law Reporter*, Washington, D. C., JNO. L. GINCK.
 W. N. C. — *Weekly Notes of Cases*, Philadelphia, KAY & BRO.
 West. Jur. — *Western Jurist*, Des Moines, Iowa, MILLS & CO.

ADMIRALTY.

1. CONTRACT TO BUILD SHIP. — OWNERSHIP. — Upon a contract to build and deliver a ship after a successful trial trip at sea, although the party for whom it is built in pursuance of the contract inspects and approves the work as it progresses and makes payments thereon, in proportion to such progress, such party does not thereby become the owner of such vessel, nor until the final completion and delivery thereof. *The Revenue Cutter*, D. C. U. S. Or., Pac. Law Rep., January 23, 1877.

2. MARITIME CONTRACT DEFINED. — A vessel launched and afloat upon the navigable waters of this district (Oregon) is a ship, and a contract to furnish materials for her equipment is a maritime one. The ruling in *The Eliza Ladd* affirmed. *Id.*

3. POSSESSION DEFINED. — A party contracted with the United States to build and deliver a vessel after a successful trip at sea, and the latter in pursuance of the contract kept a superintendent at the vessel during the progress of the work, with power to reject or approve all materials

used in her construction. *Held*, that the contractor was in possession during the progress of the work and not the United States, and that the vessel was not exempt from the process of a court in a suit to enforce a lien against her for materials furnished for her equipment at the request of the contractor. *Ib.*

4. *IBID.* — The builder under such contract having failed to perform the same, and the contract being that the United States might in such case, at the option of the secretary of the treasury, complete the work at the expense of the contractor: *Held*, that until such option was exercised, the vessel was not and could not rightfully be taken into the possession of the United States; and that when it was, the United States would take possession merely as the agent of the contractor to finish the vessel for and on its account and risk. *Ib.*

See PLEADING AND PRACTICE, 5.

BANKRUPTCY.

1. **MECHANIC'S LIEN.** — **PROCEEDINGS IN BANKRUPTCY TO PRESERVE.** — A mechanic's lien which derives its existence wholly from a state statute, and the continuance of which is by such statute made dependent upon the commencement of a suit within a prescribed period, is not preserved as a valid incumbrance on the property, when no suit is commenced in the state court, and no step taken in the bankrupt court equivalent to such suit, within the time limited by the statute for the preservation and enforcement of the lien, although the proceedings in bankruptcy are commenced within that period. A lien claimant can, as an equivalent for commencing a suit in a state court, prove or assert his lien in the bankruptcy proceedings within the time limited by the statute creating the lien. *In re Brunquest*, D. C. U. S. E. D. Wisc., 14 N. B. R. No. 12.

2. **SEPARATE BUSINESS AND ACCOUNTS.** — If the bankrupts, in addition to other business, carried on a brokerage business, for which they kept a separate account, and a separate bank account, a party whose bonds were sold is entitled to payment in full, if the amount in the bank is more than sufficient to pay all claims against the brokerage department. *Voight v. Lewis, Trustee*, D. C. U. S. E. D. Pa., *Ib.*

3. **ATTACHMENT.** — **BILL OF SALE.** — **PREFERENCE.** — If an insolvent defendant in an attachment suit gives a bill of sale of the attached property to the receptor, with the understanding that the property shall be sold and the property applied towards the payment of the debt of the attaching creditor, without regard to the attachment, and without a demand perfected in execution, the bill of sale is a preference; but if the understanding was that the proceeds should be applied only upon demand duly made on execution, it is valid. *Parsons v. Topliff*, S. C. Mass., *Ib.*

4. **IF THERE IS AN OMISSION TO ENTER AN ORDER REFUSING A DISCHARGE**, the bankrupt court may make it *nunc pro tunc* if no rights of third parties have intervened which can be prejudiced by making the record speak the truth. *In re Drisco*, C. C. U. S. Mass., *Ib.*

5. **SECOND PETITION.** — If a party has contracted new debts, since the filing of the first petition, he may file a second petition in bankruptcy. *Ib.*

6. GOODS ON COMMISSION. — FIDUCIARY DEBT. — If goods were consigned to the bankrupt to sell on commission, and he failed to account for the proceeds, this is a fiduciary debt, and will not be released by a discharge. — *Meador v. Sharpe*, S. C. Ga., Ib. No. 11.

7. THE COST OF AN ATTACHMENT which has been dissolved by bankruptcy may be paid out of the fund; unless that the attachment did not and could not operate to preserve the property for the general creditors. *Ex parte Holmes*, S. C. Mass., Ib.

8. IF THE BANKRUPT, BEING TRUSTEE, DEPOSITED THE TRUST FUNDS IN BANK with his own in his own name, the mode of ascertaining how much belongs to the trust estate is to take the deposits and withdrawals in the order of their dates, find out how much of the balance belongs to the trust, and how much to the general fund, and divide accordingly. *Ex parte Hobbs*, D. C. U. S. Mass., Ib.

9. MARSHAL'S FEES. — COMMISSIONS FOR DISBURSEMENTS. — The marshal is entitled to a fee of two dollars for serving a copy of the petition as well as the order to show cause on the debtor in an involuntary case. The allowance of a commission for disbursements is not limited to disbursements for court expenses. The marshal is not entitled to a commission on the value of property for the seizure or custody thereof. *In re Burnell Brothers*, D. C. U. S. E. D. Wisc., Ib.

10. THE MEANING OF THE WORD "TRADESMAN" in section 5110, is substantially the same as shopkeeper. Persons who buy and sell in a small way, merely by way of eking out their living, which is principally earned in other ways, are not tradesmen. As the word tradesman is in a section that is almost penal, it should be confined in its meaning. *In re Cote*, D. C. U. S. Mass., Ib.

11. COMPOSITION. — SECURED CREDITOR. — LEVY OF EXECUTION ON PERSONAL PROPERTY. — If a resolution of composition has been duly ratified, it confines the secured creditor to his security, and discharges the debtor from personal liability for the secured debt. If a composition is entered into for cash payments, secured by a mortgage on real estate, the district court has no jurisdiction to restrain a creditor from levying an execution on personal property, although the name of such creditor was properly placed on the list of creditors. *In re Lytle*, D. C. U. S. W. D. Pa., Ib. No. 10.

BILLS AND NOTES.

FRAUD OR ILLEGALITY, IN THE INCEPTION OF A NEGOTIABLE PROMISSORY NOTE TRANSFERRED BEFORE MATURITY, will vitiate the same in the hands of a person having knowledge of the fraud or illegality; and when such fraud or illegality is established, the burden of proof is devolved upon the holder, to show that he took the note in good faith or for value. But when such note is taken in good faith and for value, the holder is vested with a good title, notwithstanding there may have been circumstances connected with the transfer to him sufficient to put an ordinarily prudent man on inquiry. *Hamilton v. Marks*, S. C. Mo., Am. Law Reg., January, 1877.

BROKERAGE.

RIGHT OF BROKER TO COMMISSIONS. — When a broker authorized to sell at private sale has commenced a negotiation, the owner cannot, pend-

ing the negotiation, take it into his own hands and complete it either at or below the price limited, and then refuse to pay the commissions. Plaintiff's right to recover commissions for making a sale is not affected by the fact that he was to be one of the purchasers if he acted openly and fairly. *Reed v. Reed*, S. C. Pa., Leg. Int., February 9, 1877.

COMMISSION.

See BROKERAGE.

COMMON CARRIER.

NEGLIGENCE. — LIMITING COMMON LAW LIABILITY BY SPECIAL CONTRACT. — Where a railway company has, in fact, only one rate at which it carries or offers to carry cattle from O. to S., although it may have posted up, in the office of its agent at O. other and higher rates; and an owner of cattle, without anything being said about any special contract, but with the consent of the company, places his cattle in the company's cars at O., to be transported to S.; and the agent of the company at O. then presents to the shipper a certain special contract for carrying said cattle at the full rate at which the company carries cattle, though less than said posted rates and with certain restrictions, limitations, &c., as to the company's responsibility; and the agent then demands that the shipper shall sign said special contract or have his cattle unloaded; and the agent gives to the shipper no other option or alternative; and the shipper then signs said special contract: *Held*, that said special contract, so far as it attempts to restrict the liability of the railway company, or to impose additional burdens upon the shipper as conditions precedent to a recovery for damages resulting from the negligence of the railway company, is without consideration and void. *Kans. Pac. R. W. Co. v. Reynolds*, S. C. Kans., Cent. L. J., January 19, 1877.

CONSTITUTIONAL LAW.

OF THE POWER OF THE COURTS TO EXAMINE INTO MANNER IN WHICH ACT WAS PASSED. — A valid statute can only be passed in the manner prescribed by the Constitution; and when the provisions of that instrument, in regard to the manner of enacting laws, are wholly disregarded in respect to a particular act, it must be declared a nullity, though having the forms of authenticity.

Whenever a question arises in a court of law as to the existence of a statute, or as to the time when it took effect, or as to its precise terms, the judges who are called upon to decide such question have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; the best and most satisfactory evidence in all cases being required. And if a statute can be shown by undoubted and competent evidence never to have passed the two houses of the legislature, substantially, as it was approved by the governor, and sealed with the great seal, and published, it is a nullity; and it is the duty of the court so to declare it. *Legg v. Mayor of Annapolis*, Ct. App. Md., Am. Law Reg., January, 1877.

See MUNICIPAL BONDS, 2; PLEADING AND PRACTICE, 4; TAXATION.

CONTRACT.

See ADMIRALTY, 1; COMMON CARRIER; MUNICIPAL BONDS.

CONVERSION OF STOCK.

See DAMAGES.

CRIMINAL LAW.

1. SENTENCE AFTER ADJOURNMENT OF COURT FOR TERM AT WHICH TRIAL IS HAD. — If the judge who tries an indictment upon which a verdict of guilty is found fails to pronounce sentence during the term of the court at which the verdict was found, by accident, mistake, or design, he may do so at any subsequent term, and so may any other judge holding the same court. *U. S. v. May*, S. C. D. C., W. L. R., January 22, 1877.

2. ASSAULT WITH INTENT TO COMMIT MANSLAUGHTER. — Under a statute which provides that "if any person shall unlawfully kill any human being without malice express or implied, either voluntarily upon a sudden heat, or involuntarily, but in the commission of some unlawful act, such person shall be deemed guilty of manslaughter;" and a person indicted for an assault, or an assault and battery with intent to commit manslaughter, may be convicted of the whole charge, or acquitted of the attempt to commit manslaughter and found guilty of the misdemeanor only. *State v. Throckmorton*, S. C. Ind., West Jur., January, 1877.

DAMAGES.

CONVERSION OF STOCK. — In an action for conversion of stock, if plaintiff waives the tort and sues in assumpsit, the measure of damages is the market value of the stock at the time of conversion. It is not the rule, even in the action of trover in such a case, that the plaintiff is entitled to recover the highest price which the stock would have commanded at any time before the trial. That rule is confined to the case where there is a duty or obligation devolved upon a defendant to deliver such stock at a particular time, and that duty or obligation has not been fulfilled. *Wagner v. Peterson*, S. C. Pa., Leg. Int., February 9, 1877.

DIVORCE.

See PLEADING AND PRACTICE, 1.

ELECTION.

1. PRESIDENTIAL ELECTOR. — A MEMBER OF THE CENTENNIAL COMMISSION holds an office of trust under the United States which makes him ineligible as a presidential elector. *In re Corliss*, S. C. R. I., Am. Law Reg., January, 1877.

2. INELIGIBILITY BY REASON OF HOLDING SUCH OFFICE at the time of the election cannot be removed by a subsequent resignation of the office. *Ib.*

3. THE EFFECT OF SUCH INELIGIBILITY of the person receiving the

highest number of votes is to avoid the election. It does not elect the person having the next highest number of votes. *Ib.*

JURISDICTION.

OF U. S. COURTS. — UNDER THE ACT OF MARCH 3, 1875, the United States circuit courts have jurisdiction over a suit in equity to foreclose a mortgage, given to secure a promissory note, where the assignee and holder is a citizen of another state, though the assignor could not, by reason of citizenship, have brought the suit. *Seckel v. Backhaus*, C. C. U. S. E. D. Wisc., Chicago L. N., February 3, 1877.

MANDAMUS.

1. APPLICATION FOR MANDAMUS WHICH DEPENDS ON VALIDITY OF STATUTE. — On an application for a mandamus, the right to which depends upon the question whether a certain public statute, appearing in the statute book with all the prescribed forms of authentication, is valid or not, the onus of proof is upon the applicants, with a strong presumption against the right asserted by them; and before that right can be recognized and judicially declared in the face of a public statute, having almost a conclusive presumption in its support, the applicants are bound to furnish the most conclusive evidence of the truth of the facts upon which they rely to invalidate the statute. *Legg v. Mayor of Annapolis*, Ct. App. Md., Am. Law Reg., January, 1877.

2. NEVER A PREVENTIVE WRIT. — Mandamus is a writ commanding the performance of some act or duty therein specified, in the performance of which the applicant for the writ is interested, or by the non-performance of which he is aggrieved or injured. As a preventive remedy simply, it is never used. Its use is confined to those occasions where the law has established no specific remedy, and where in justice and good government there ought to be one. A mandamus does not lie to prevent a person from being disturbed or molested in the exercise of the functions and powers pertaining to his office. *Ib.*

See PLEADING AND PRACTICE, 2, 3.

MUNICIPAL BONDS.

SUBSCRIPTION TO STOCK. — WHERE ACT CONTAINS NO CONDITION AS TO TIME. — CONSTRUCTION OF AGREEMENT TO BUILD WITHIN SPECIFIED TIME, ETC. — A township voted to subscribe to the capital stock of a railroad company, and to issue its bonds in payment on condition that the road was completed, equipped, and running from P. to D. within five years. The road was built to within one mile of D., and a part of another road leased, by which arrangement the company ran its trains from P. to D. The company tendered the stock and requested the township officers to subscribe, which they refused to do. By this refusal the company was delayed in completing its own road to the city limits until after the five years had elapsed: *Held*, that the company had substantially complied with the conditions, and that it was the duty of the township to have subscribed to the stock of the company, the condition

referring to the payment, and not the subscription; that as the act authorizing the vote contained no conditions as to the time of subscribing, but only as to the payment of such subscription, it was the duty of the township officers to subscribe at once; and if, by reason of default, the company did not build its road within the time specified, the township could not plead such non-compliance in defence to an action by the company. *People v. Supervisor, &c. of Danville Township*, S. C. Ill., Mo. West. Jur., February, 1877.

NEGLIGENCE.

See COMMON CARRIER.

NUISANCE.

See TRESPASS.

PLEADING AND PRACTICE.

1. **DIVORCE. — AVERMENTS OF PETITION.** — In proceedings for divorce (except where the injury complained of was committed within the state, or while one or both of the parties resided within it), residence within the state for twelve months next before the institution of the suit is a constitutive and jurisdictional fact, which must be alleged in the petition. And a decree of divorce, rendered upon a petition which lacks the averment of this jurisdictional fact, is *coram non judice* and void. *Cole v. Cole*,¹ St. Louis (Mo.) Ct. of App., Cent. L. J., January 19, 1877.

2. **MANDAMUS.** — IF THE ANSWER TO AN APPLICATION FOR A MANDAMUS contains or sets up any sufficient reason for refusing the writ, though it be in other respects evasive and irresponsible, it should not be quashed as a whole. *Legg v. Mayor of Annapolis*, Ct. App. Md., Am. Law Reg., January, 1877.

3. **WHERE THE ANSWER TO A PETITION FOR A MANDAMUS IS QUASHED**, the allegations of the petition are not authorized to be taken *pro confesso*; nor is the judge authorized to enter judgment as by default for want of answer, or by *nil dicit*. The case must be heard *ex parte*, and the mind of the judge satisfied both as to the law and the facts, before the writ can be ordered. *Ib.*

4. **STATUTE WILL NOT BE DECLARED INVALID UPON ADMISSIONS OF PARTIES.** — It is not competent for parties, though engaged in an adverse litigation, to procure a public statute, affecting the public interest, to be declared a nullity, upon their mere allegations and admissions as to the manner in which the statute was enacted by the legislature. Proof of a higher and more reliable character should be required in such case. *Ib.*

5. **LIBEL BY INSURER AGAINST CARRIER.** — In a libel by the insurer, who has paid the loss to the assured, against the carrier, by whose wrongful act the loss occurred, the respondent is not permitted to set up as a defence that the insurer was not legally bound to indemnify the assured for the loss sustained by such wrongful act. Such libel is properly filed in

¹ The report of this cause is accompanied by a note in which decrees in divorce cases obtained by fraud, which was the subject of judi-

cial remark in the principal case, are quite fully and intelligently discussed. — EDITOR.

the name of the insurer, and it is not necessary nor proper in admiralty that the action be brought in the name of the assured for the use of the insurer. *Amazon Ins. Co. v. The Iron Mountain*, D. C. U. S. So. D. Ohio, Cent. L. J., February 2, 1877; Chicago L. N., February 3, 1877.

6. SLANDER. — PROOF OF GENERAL RUMOR. — In England, and in some of the United States courts, it has been held that, under the general issue, in slander, the defendant may prove in mitigation of damages that when the words were uttered a general rumor or report existed in the neighborhood that the plaintiff was guilty of the offence charged, but in Pennsylvania the rule is different. *Pease v. Shippen*, S. C. Pa., Leg. Int., February 9, 1877.

See CRIMINAL LAW, 1; MANDAMUS, 1; REMOVAL OF CAUSES.

PRESIDENTIAL ELECTOR.

See ELECTION.

REMOVAL OF CAUSES.

CAUSE PENDING READY FOR RETRIAL. — Under the Act of March 3 1875, providing for the removal of causes from the state to the federal courts, a cause once tried, but pending, ready for retrial when the act was passed, is removable. *Crane v. Reeder*, C. C. U. S. E. D. Mich., Albany L. J., February 10, 1877.

SLANDER.

See PLEADING AND PRACTICE, 6.

STOCK.

See DAMAGES.

TAXATION.

1. WHARFAGE TAX. — WHEN TONNAGE TAX MAY BE IMPOSED BY CITY. — A city cannot levy a tax in the nature of a tonnage duty upon vessels or commerce, nor can it do so by way of discrimination. But a city, under legislative authority, or a riparian owner, can lawfully charge reasonable compensation for the use of expensive and artificial conveniences which a vessel may use at its option, — there being ample space elsewhere for it to land within the harbor where no artificial or expensive improvements have been made. *U. W. Union Packet Co. v. City of St. Louis*, D. C. U. S. E. D. Mo., Cent. L. J., January 19, 1877.

2. IBID. — CONSTITUTIONAL LAW. — THE ORDINANCE OF THE CITY OF ST. LOUIS prescribing certain wharfage dues at the improved wharves constructed by it, graduated according to the size of the vessel, to be ascertained by its tonnage, is not in conflict with the provisions of the federal Constitution in respect to interstate commerce, and the prohibition that "no state shall, without the consent of Congress, lay any duty of tonnage." *Id.*

TRESPASS.

NUISANCE AND TRESPASS DISTINGUISHED. — Where A enters upon the land of B and digs a ditch thereon, there is a direct invasion of the rights of B. A completed trespass, and the cause of action for all injuries resulting therefrom, commences to run at the time of the trespass. And the fact that A does not reënter B's land and fill up the ditch does not make him a continuous wrong-doer and liable to repeated actions as long as the ditch remains unfilled. A party may be responsible as a continuing wrong-doer, as for permitting a nuisance to remain upon his lands; but no one can be charged as such continuing wrong-doer who has not the right and is not under the duty of terminating that which causes the injury. *K. S. R. R. Co. v. Muhlman*, S. C. Kans., Cent. L. J., February 2, 1877.

WILL.

ESTIMATING VALUE OF BEQUEST TO UNBORN DEVISEES. — BEQUESTS OF CERTAIN SHARES OF STOCK were made to living grandchildren by name; and further, testator directed his executors to set aside equal amounts for other grandchildren that might be born within a certain date. *Held*, that the value of the bequest to the unborn grandchildren was to be fixed by the value of the stock at the date of the will. *In re Clarke*, S. C. Pa., Leg. Int., January 19, 1877.

CIRCUIT COURT OF THE UNITED STATES. — SOUTHERN DISTRICT OF NEW YORK.

[FEBRUARY, 1877.]

TRADE-MARK. — FORM OF PACKAGE.

HARRINGTON v. LIBBY.

Held, that complainant could not legally enjoy the exclusive right to use a decorated tin pail as a collar box, notwithstanding that he was the first to so employ it, and had registered it as a trade-mark.

THE facts are sufficiently stated in the opinion.

J. A. Whitney, Esq., for complainant.

E. Wetmore, Esq., *contra*.

JOHNSON, J. The plaintiff claims to be entitled to the exclusive use of a tin pail with a bail or handle to it, the tin ornamented with a geometrical pattern, and used to contain paper collars. This claim is made not on the ground that he is the inventor and patentee of pails thus made, or of the material used in making them, or of the art of selling collars by giving away a tin pail with them. But the claim is that the pail is a trade-mark, and entitled to protection as such, either by force of the statute of the United States on the subject, or by virtue of the general

law of trade-marks. It appears that the ornamented tin which the plaintiff employs is a common article in commerce, and that pails made of tin, ornamented or unornamented, are and have long been in use for all such purposes as any one chose to apply them to.

The question whether any one can seize upon such an article and make title to its exclusive use for a special purpose by calling it a trade-mark, must be far from clear in favor of the claimant. The forms and materials of packages to contain articles of merchandise, if such claims should be allowed, would be rapidly taken up and appropriated by dealers; until some one, bolder than the others, might go to the very root of things and claim for his goods the primitive brown paper and tow string as a peculiar property. It will be observed that it is not a mark at all which is claimed, but the whole enveloping package, the whole surface of which is covered by the ornamental pattern. There is no name, no symbol, no assertion of origin or ownership. The case strongly resembles that of Payson's Indelible Ink (Browne on Trade-marks, 186, 187), where the claim was rejected, on the ground that if maintained the effect would be to gradually throttle trade.

The case of *Moorman v. Hoge*, 2 Sawyer, 78, seems to me quite in point. In favor of maintaining the right to the barrel in question, in that case, all circumstances of fact concurred; but the court held that the law did not recognize an exclusive right to an unpatented package, nor permit its assertion. I concur in the principles maintained in that case, and think the plaintiff has failed to show such a right in the premises as can entitle him to a preliminary injunction. *The motion must be denied.*

NOTES OF NEW BOOKS.

TWO EXHAUSTIVE ESSAYS BY JUDGE DILLON, one on the *Removal of Causes*, and the other on *Municipal Bonds*, have been reprinted from the *Southern Law Review*, and are offered by the proprietors of the *Central Law Journal*, St. Louis. Price 75 cents in paper; \$1.00 in cloth. Their great value is beyond question.

SANSUM'S INSURANCE DIGEST. A Digest of the Law of Insurance: being an analysis of Fire, Marine, Life and Accident Insurance Cases adjudicated in the Courts of England, Ireland, the United States of America, and Canada, commencing with the earliest reported adjudications and continued to the present time. Chicago: Callaghan & Co.

A REPUBLICATION OF VOLUMES 19 to 31 of the *Illinois Reports* is announced by Norman L. Freeman, Esq., and Wm. L. Gross, Esq., of Springfield, Ill.

REPORTS OF CASES DETERMINED IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE FIRST CIRCUIT. Jabez S. Holmes, Reporter. Volume I., July, 1870—June, 1875. Boston: Little, Brown & Company. This volume, although it does not contain the usual number of cases, embraces not a few opinions of more than usual interest and value. The decisions touching Admiralty and Patents are especially to be remarked.

THE AMERICAN LAW TIMES.

NEW SERIES. — APRIL, 1877. — VOL. IV., No. 4.

NOTES OF OPINIONS, DECISIONS, AND ORDERS

OF THE

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1876.

Thursday, March 1, 1877.

No. 878. *S. Heydenfeldt, plaintiff in error, v. The Daney Gold & Silver Mining Co.* In error to the Supreme Court of the State of Nevada. Mr. Justice Davis delivered the opinion of the court, affirming the judgment of the said supreme court, with costs. This was an action of ejectment to recover a specific portion of certain land in Nevada. The land, rich in minerals, was not surveyed by the United States until the year 1867. Prior to the date of the survey, or the approval of it, the defendant's grantors and predecessors in interest had for mining purposes entered upon the land, and claimed and occupied it according to the mining laws and the custom of miners in the locality. This possession and claim of ownership had been continuous and uninterrupted, and the defendant has expended a large amount in the construction of improvements for carrying on the business of mining on the land. The plaintiff claimed title from the state by patent. It was dated the 14th of July, 1868, and was issued on the assumption that the land whether surveyed or unsurveyed, and whether containing minerals or not, was granted to the state for the support of common schools, by the Nevada enabling act, approved March 21, 1864, 13 Stat. 32. This interpretation of that act was denied by the general government, and the defendant received a patent on the 2d of March, 1874, from the United States for the land in controversy, issued in conformity with the laws of Congress on the subject of mining. Which was the better title was the point for decision. The court here rules that the title of the patentee must prevail.

No. 157. *R. G. Hervey et al., plaintiffs in error, v. The Rhode Island Locomotive Works*; and No. 158. *The Indianapolis, Bloomington & Western Railroad Co., plaintiff in error, v. The Rhode Island Locomotive Works.* In error to the circuit court of the United States for the Southern District of Illinois. Mr. Justice Davis delivered the opinion of the court, reversing the judgments of the said circuit court, with costs, and remanding the causes, with instructions to award a *venire facias de novo*. By stipulation, the judgment in No. 157 is affirmed as to locomotive "Olney No. 1." In these cases it is ruled that, on the authority of *Green v. Van Buskirk*, 5 Wall. 307; 7 Ib. 137, and other cases, the liability of property to be sold under legal process, issuing from the courts of the state where it is situated, must be determined by the law there rather than that of the jurisdiction where the owner lives; and that the federal courts will adopt and effectuate the constructions of the state courts.

No. 73. *John G. Taming, plaintiff in error, v. The United States Freehold & Emigration Co.* In error to the Supreme Court of the Territory of Colorado. Mr. Justice Davis delivered the opinion of the court, affirming the judgment of the said supreme court, with costs. This case involved a construction of the Act of Congress of June 21, 1860 (12 Stat. 71), to confirm certain private land claims in New Mexico.

No. 170. *William Bayne, trustee, &c., appellant, v. The United States.* Appeal from the Circuit Court of the United States for the District of Maryland. Mr. Justice Davis delivered the opinion of the court, affirming the decree of the said circuit court. The United States, March 31, 1866, having moneys on deposit in the First National Bank of Washington, a public depository, gave a draft for \$200,000 on that institution in favor of B't Col. Paulding, a paymaster in the army. He deposited it to his credit, as such officer, in that bank, the thirteenth day of the following April. He had no individual account there. On the 21st of the latter month he drew two checks on that bank, each for \$100,000, indorsed them in blank, and sent them to the cashier of the Merchants' Bank of Washington, who presented them to the former bank with the information that L. P. Bayne, a member of the firm of Bayne & Co., desired that \$100,000 should be deposited to its credit in New York. This was done, and the amount realized by Bayne & Co. One half of the remaining \$100,000 was paid in currency to the Merchants' Bank, and a draft on a banking institution in New York given for the residue. It was afterwards transferred by the Citizens' Bank to Bayne & Co. The decree of the circuit court confined the rights of the United States as a preferred creditor to the \$100,000 which was deposited to the credit of the firm in New York, and this view is here affirmed.

No. 172. *Nathaniel S. Donaldson, assignee, &c., plaintiff in error, v. John V. Farwell et al.* In error to the Circuit Court of the United States for the Eastern District of Wisconsin. Mr. Justice Davis delivered the opinion of the court, affirming the judgment of the said circuit court, with costs. Mann, a merchant doing business at Richfield, a small village on the St. Paul Railway, filed May 24, 1872, his petition, in the district court of the United States for the Eastern District of Wisconsin, to be declared a bankrupt. He was duly adjudged a bankrupt the 6th day of June then next ensuing, and the plaintiff was, on the 1st day of the following July, appointed his assignee. In the month of April of that year the defendants sold, at Chicago, to Mann, on credit, goods and merchandise amounting in value to \$5,000. His son was the agent in purchasing them, and directed them to be shipped to Milwaukee, stating that it was his intention to have them hauled from there to Richfield. He knew that his father was then, and for two or three years before had been, insolvent, and he testified that at the time of the purchase he did not expect that his father would pay for the goods, that he did not expect to pay for them himself, and that his object in having them sent to Milwaukee was to place them in the hands of one Schram, in order that they should be there sold and the proceeds paid to some creditors of his father, who had sold him produce and advanced him money. The goods were shipped to "E. Mann, Milwaukee," conformably to the directions. They were, on their arrival, sent to Schram's store. The last of the invoices bore date April 17. Mann was reputed to be solvent. The defendants had no notice of his insolvency until the last days of May. On the 5th of June, ascertaining that a large quantity of the goods was in a loft of a store in Milwaukee, they took possession of them. They subsequently found the remaining goods, with the exception of \$100 in value, in the store of Mann at Richfield, and, after formally demanding them of the assignee, took and shipped them to Chicago. This action was brought by the assignee to recover the value of the goods, and judgment was had for the defendants, which is here affirmed.

No. 99. *Ira G. Munn and George L. Scott, plaintiffs in error, v. The People of the State of Illinois.* In error to the Supreme Court of the State of Illinois. Mr. Chief Justice Waite delivered the opinion of the court, affirming the judgment of the said supreme court, with costs. Dissenting, Mr. Justice Field. No. 324. *The Chicago, Burlington & Quincy Railroad Co., appellant, v. M. E. Cutts, Attorney General, et al.* In error to the circuit court of the United States for the District of Iowa. Mr. Chief Justice Waite delivered the opinion of the court, affirming the judgment of the said circuit court, with costs. Dissenting, Mr. Justice Field. The decision in these causes, the most important of the "Granger" cases, will be found in the present issue of the Law Times Reports, to which attention is directed.

No. 27. *William F. Peck et al., appellants, v. The Chicago & Northwestern Railway Company et al.*; No. 40. *De Witt C. Lawrence et al., appellants, v. George H. Paul et al.* Appeals from the circuit court of the United States for the Western District of Wisconsin. Mr. Chief Justice Waite delivered the opinion of the court, affirming the decrees of the said circuit court, with costs. Dissenting, Mr. Justice Field. These suits presented the single question of the power of the Legislature of the State of Wisconsin to provide by law for a maximum of charge to be made by the Chicago and Northwestern Railroad Company, for fare and freight upon the transportation of persons and

property carried within the state, or taken up outside and brought within it, or taken up inside and carried out. The decision is, that until Congress acts in reference to the relations of the inter-state commerce, it is competent for the state to regulate the fares of the railroads so far as they are of domestic concern. This company, it is said, has domestic relations with the state, and incidentally these relations may reach beyond the state. Until Congress undertakes to legislate for those who are without the state, Wisconsin may provide for those within, even though it may indirectly affect those without.

No. 352. *The Chicago, Milwaukee & St. Paul Railway Company, plaintiff in error, v. H. M. Ackley et al.* Mr. Chief Justice Waite delivered the opinion, affirming the judgment of said circuit court, with costs. The only question presented in this case is, whether a railroad company in Wisconsin can recover for the transportation of property more than the maximum fixed by the statute, by showing that the amount charged was no more than a reasonable compensation for the services rendered. The decision is, that as between the company and a freighter the maximum of the statute is the limit of the recovery for transportation actually performed.

No. 353. *L. D. Stone, plaintiff in error, v. The State of Wisconsin.* In error to the circuit courts of the counties of Milwaukee and Dane, State of Wisconsin. Mr. Chief Justice Waite delivered the opinions of the court, affirming the judgments, with costs. Dissenting, Mr. Justice Field. The only question in this case not decided in the case of the *Chicago, Milwaukee & St. Paul Railroad Company v. Ackley*, No. 352, was as to the effect upon the rights of these parties of the charter of the Milwaukee and Waukesha Railroad Company, passed by the territorial Legislature of Wisconsin in 1847. This provides that . . . it shall be lawful for the company to demand and receive such sum or sums of money for passage and freight of persons and property as they shall, from time to time, think reasonable. . . . The court affirm the view of the supreme court of the state on this question, that the charter was accepted and the corporation organized many months after the adoption of the Constitution and the admission of the state into the Union by Congress. Previous to that time it remained a naked proposition. For this reason it is held that its acceptance after the organization of the state, so far as it is a contract, makes it manifestly a contract with the state.

No. 10. *The Winona & St. Peter Railroad Company, plaintiff in error, v. John D. Blake et al.* In error to the supreme court of the State of Minnesota; No. 74. *Charles McIlrath, receiver, &c., plaintiff in error, v. Charles S. Coleman.* In error to the circuit court of the United States for the District of Minnesota. Mr. Chief Justice Waite delivered the opinion of the court, affirming the judgments in these causes, with costs and interest. Dissenting, Mr. Justice Field. In the former case it is said that the road was by its charter bound to carry when called upon—as a common carrier—and charge only reasonable rates. These are incidents of the occupation in which it was authorized to engage. The case is held to fall within the decision in No. 99, *Munn v. The People*. In No. 74 it is held the question is the same, and the decision is affirmed in both cases.

Friday, March 2, 1877.

No. 160. *H. W. Fuller and J. W. Barnum, appellants, v. E. S. Yentzer and W. Scates*; No. 161. *H. W. Fuller and J. W. Barnum, appellants, v. E. S. Yentzer and W. Scates*; and No. 162. *H. W. Fuller and J. W. Barnum, appellants, v. Herman B. Goodrich.* Appeals from the circuit court of the United States for the Northern District of Illinois. Mr. Justice Clifford delivered the opinions of the court, affirming the decrees of the said circuit court, with costs. Dissenting—Mr. Justice Strong, Mr. Chief Justice Waite, Mr. Justice Miller, and Mr. Justice Bradley. These were patent cases which went off on the question of infringement. The court did not announce any new doctrine.

DIGEST OF CASES

PUBLISHED IN EXTENSO IN LATE ISSUES OF AMERICAN LEGAL PERIODICALS.

ABBREVIATIONS.

Albany L. J. — *Albany Law Journal*, Albany, N. Y., WEED, PARSONS & CO.
 Am. Law Rec. — *American Law Record*, Cincinnati, O., H. M. MOOS.
 Am. Law Reg. — *American Law Register*, Philadelphia, Pa., D. B. CANFIELD & CO.
 Cent. L. J. — *Central Law Journal*, St. Louis, Mo., SOULE, THOMAS & WENTWORTH.
 Chicago L. N. — *Chicago Legal News*, Chicago, Ill., CHICAGO LEGAL NEWS CO.
 Ins. L. J. — *Insurance Law Journal*, New York, C. C. HINE, 176 Broadway.
 Int. Rev. Rec. — *Internal Revenue Record*, New York, W. P. & F. C. CHURCH.
 La. L. J. — *Louisiana Law Journal*, New Orleans, La.
 Leg. Chron. — *Legal Chronicle*, Pottsville, Pa., SOL. FOSTER, JR.
 Leg. Int. — *Legal Intelligencer*, Philadelphia, Pa., J. M. POWER WALLACE.
 Mo. West. Jur. — *Monthly Western Jurist*, Bloomington, Ill., T. F. TIPTON.
 N. B. R. — *National Bankruptcy Register*, New York, CAMPBELL & CO.
 Pac. Law Rep. — *Pacific Law Reporter*, San Francisco, Cal., J. P. BOGARDUS.
 Pittsb. L. J. — *Pittsburg Legal Journal*, Pittsburg, Pa., J. W. & J. S. MURRAY.
 W. L. R. — *Washington Law Reporter*, Washington, D. C., JNO. L. GINCK.
 W. N. C. — *Weekly Notes of Cases*, Philadelphia, KAY & BRO.
 West. Jur. — *Western Jurist*, Des Moines, Iowa, MILLS & CO.

ASSIGNMENT.

1. **EQUITABLE ASSIGNMENT. — POWER OF ATTORNEY. — DEATH OF ATTORNEY.** — A verbal agreement by a debtor to transfer stock to his creditor as security for the debt, followed by the execution of an irrevocable power of attorney to an agent of the creditor to transfer the stock, amounts to an equitable assignment of the stock to the creditor: and the power of attorney, being thus coupled with an interest, is not revoked by the death of the attorney before having executed it. *Lightner's Appeal*, S. C. Pa., W. N. C., February 1, 1877.

2. **ASSIGNMENT DOES NOT CARRY WITH IT RIGHT OF ACTION IN TORT.** — Although the assignment of a debt carries with it all remedies and securities incident thereto, it does not transfer a personal right of action in tort, vested in the assignor, growing out of the same subject matter. *Morris v. McCulloch*, S. C. Pa., Ib., February 22, 1877.

ATTORNEY.

See ASSIGNMENT, 1.

BANKRUPTCY.

1. **IF AN ASSIGNMENT IS FRAUDULENT**, a creditor may obtain a lien upon the real estate by getting a judgment against the debtor, and upon the personal property by the levy of an execution thereon; and such liens will be valid as against the assignee in bankruptcy, if they are obtained before the commencement of the proceedings. *Johnson v. Rogers*, D. C. U. S. N. D. N. Y., 15 B. R. No. 1.

2. **IF THERE ARE SEVERAL JUDGMENTS**, the priority of the lien on

the real estate depends on the order in which the judgments are obtained, and the priority of the lien on the personal property is determined by the order of the levy. *Ib.*

3. A CREDITOR WHO IS PRECLUDED FROM ASSAILING AN ASSIGNMENT AS FRAUDULENT cannot obtain a lien on the property which will be valid as against the assignee in bankruptcy. *Ib.*

4. A CREDITOR WHO, WITH FULL KNOWLEDGE OF THE FACTS that constitute the fraud, concurs with other creditors in assenting to its execution, cannot impeach it as fraudulent. *Ib.*

5. A PARTY WHO TAKES A COLORABLE TRANSFER OF A CLAIM from a trustee who has accepted the trust with full knowledge of all the facts that constitute the fraud, cannot impeach the assignment. *Ib.*

6. A CREDITOR WHO HAS ASSENTED TO AN ASSIGNMENT may purchase a claim from another creditor who has not done so, and as to that claim may impeach the assignment. *Ib.*

7. A CREDITOR WHO PURCHASES PROPERTY FROM THE TRUSTEE in ignorance of the fraud, is not precluded from impeaching the assignment. *Ib.*

8. A JUDGMENT AGAINST A PARTNER individually is a lien upon real estate held by the firm, subject, however, to the payment of the firm debts and the equities of his copartners. *Ib.*

9. A PARTY WHO PURCHASES A JUDGMENT has no higher right to impeach a fraudulent assignment than his assignor had. *Ib.*

10. THE LIEN ACQUIRED BY FILING A CREDITOR'S BILL extends only to property which cannot be reached on execution. *Ib.*

11. UNTIL A RECEIVER IS APPOINTED in the creditor's action, there is no lien, as against chattels that are subject to levy and sale on execution, which can be upheld as against the assignee. *Ib.*

12. THE LIMITATION OF SECTION 2057 does not apply to a proceeding to review a decree in equity. *Wilt v. Stickney*, D. C. U. S. N. D. Ohio, *Ib.*

13. IF THE BANKRUPT GAVE A DEED WITH WARRANTY OF TITLE WHEN HE HAD MERELY A BOND for a title, his discharge will release him from his liability on the warranty. The mere levy of a *fi. fa.* is not sufficient evidence of a breach of a warranty of title. *Williams v. Harkins*, S. C. Ga., *Ib.*

14. THE REGISTER MAY DESIGNATE THE NEWSPAPERS in which notice of a rule by the assignee shall be published. *Burke v. McKee*, D. C. U. S. S. D. N. Y., *Ib.*

15. AN AFFIDAVIT OF DEFENCE WHICH SETS UP AN ADJUDICATION OF BANKRUPTCY is sufficient to prevent the entry of a judgment, and entitle the defendant to a stay of the action. *Frostman v. Hicks*, Ct. C. P. Pa., *Ib.*

16. SUSPENSION OF PAYMENT BY BANK. — SPECIAL DEPOSIT, ETC. — When a bank which had suspended payments advertised that it would, on a certain day, "resume business by receiving special separate deposits in trust to new account, pledging the bank to use these deposits only in payment of checks against that new account, and as fast as the bank can collect and realize from the loans and securities, to pay *pro rata* instalments on its present indebtedness," &c., &c., and received new deposits,

and soon after finally failed, and was adjudicated in involuntary bankruptcy: *Held* (on petition of a new depositor to be paid in full as a preferred creditor), that the new deposits were not special deposits; that no lien was secured when they were paid in over the counter of the bank; that no preference was secured by the advertisement; and that the new depositors were general creditors to be paid *pro rata*. *In re Mut. Building Fund Soc., &c.*, D. C. U. S. E. D. Va., *Ib.*

17. THE PARTNERS OF THE BANKRUPT ARE BOUND BY THE DISCHARGE as well as the joint creditors. *Wilkins v. Davis*, D. C. U. S. Mass., *Ib.*

18. A JOINT CREDITOR MAY PROVE AGAINST THE SEPARATE ESTATE OF THE BANKRUPT, and may vote for assignee, examine the debtor, and object to his discharge. He cannot compete with the separate creditors in the distribution of separate assets, but will receive dividends from any joint assets which the assignee may obtain, and from any surplus of the separate assets after the separate debts are paid. *Ib.*

19. BANKRUPTCY OF ONE PARTNER.— DISSOLUTION.— The bankruptcy of one partner, *ipso facto*, dissolves the partnership, and the assignee is tenant in common with the solvent partner in the joint stock. A court of equity may give either the solvent partners or the assignee the settlement of the joint affairs. It is not necessary that the firm should be declared bankrupt, in order to vest the bankrupt's share of the joint estate in his assignee. The assignee may recover at law or in equity, as the nature of the case requires, from a solvent partner, what is due from him by the articles of copartnership. *Ib.*

20. THE CLAIM OF AN ATTORNEY FOR SERVICES rendered in defending a suit prior to the commencement of the proceedings in bankruptcy is not entitled to priority. The claim of an attorney for services rendered in preparing the petition and schedules and filing the same is not entitled to priority. *In re Handell*, D. C. U. S. W. D. Texas, *Ib.* No. 2.

21. WHEN DEFENDANT IN SUIT BY ASSIGNEE UNDER STATE LAW CANNOT PLEAD BANKRUPT ACT.— Whether by an assignment by bank directors under the general banking law of Pennsylvania is invalid, because in contravention of the United States bankrupt law, is a question which can be raised only by the creditors of the bank. A debtor of the bank cannot, in a suit against him by the assignees, set up as a defence that the assignment was invalid under the bankrupt law. *Shryock v. Bashore*, S. C. Pa., W. N. C., February 22, 1877.

22. TRANSFER OF PROPERTY BY INSOLVENT.— A transfer of property by an insolvent debtor, contrary to § 5128 of the R. S., is contingently valid, and the receipt of the same by the creditor is not tortious, and does not itself amount to a conversion of the property. *Schuman v. Fleckenstein*, D. C. U. S. Oregon, Chicago L. N., February 17, 1877.

23. AN ACTION BY AN ASSIGNEE IN BANKRUPTCY TO RECOVER THE VALUE OF GOODS transferred by the bankrupt, contrary to § 5128 of the R. S., is in substance and effect an action of trover, and the complaint must either allege an actual conversion of the property to the use of the defendant, or a demand and refusal to deliver the same to the assignee. *Ib.*

24. DAMAGES FOR DETENTION OF, OR INJURY TO, PROPERTY BY CRED-

ITOR. — In such action the assignee may recover damages for the detention of the property, including profits made out of it, or injuries received by it while in possession of the creditor. *Ib.*

BILLS AND NOTES.

1. LEX LOCI CONTRACTUS. — WHERE BILL IS PAYABLE. — THE RATE OF INTEREST AND DAMAGES which the drawer of a bill is to pay, *ex more*, is governed by the law of the place where the bill is drawn. If a bill is made and dated at the business domicile of the drawer, his understanding is to pay it there, in case of dishonor, though it may have been negotiated elsewhere. Damages in a case of this sort, are a part of the law of performance, and not of the execution and validity of the contract nor of the remedy. *Ex parte Heidelberg*, D. C. U. S. Mass., Chicago L. N., February 24, 1877.

2. SUCH A QUESTION, ARISING IN THE COURTS OF THE UNITED STATES, is one of general jurisprudence and not of local law. *Ib.*

BOND.

1. CURATOR'S BOND. — CONDITIONAL SIGNING. — A curator's bond, perfect on its face, cannot be avoided at the instance of a surety, upon the ground that he signed it under a conditional agreement, made with his principal, that the latter was not to deliver it until the signature of a certain person was also obtained, although in violation of such agreement the bond was delivered. *State v. Potter*, S. C. Mo., Cent. L. J., January 26, 1877.

2. CONTEMPORANEOUS PAROL AGREEMENT. — ESTOPPEL. — Testimony concerning a contemporaneous parol agreement is always objectionable, but in instances like the present, doubly obnoxious, where the agreement is kept sedulously concealed from the other contracting party. In such cases, the doctrine of estoppel *in pais* is fully applicable, and effectually precludes the surety from asserting anything to the contrary of that denoted by the face of the bond. *Ib.*

3. PUBLIC POLICY. — PATRIMONY OF ORPHANS. — Public policy forbids that a surety, in cases of this sort, should defend and defeat an action brought in the bond; because it concerns the state that the patrimony of orphans, confided to the protection of her courts, should not suffer loss. *Ib.*

BROKERAGE.

COMMISSIONS. — WHEN EARNED. — The rule that "no brokerage is due until the consideration has passed to the vendor," is not supported by authority. When the broker has effected a bargain and sale by a contract which is mutually binding on both vendor and vendee, he is entitled to his commission, whether the sale is finally executed or not. *Love v. Miller*, S. C. Ind., Cent. L. J., February 16, 1877.

CAPITAL.

See TESTAMENTARY LAW.

COMITY.

FOREIGN LAW. — COMITY WILL IN NO CASE REQUIRE A STATE COURT TO FOLLOW OTHER THAN WHAT IT REGARDS AS THE clearly established law of the foreign jurisdiction with reference to the contract to be affected by it. Where the contract is affected by the laws of two foreign jurisdictions, the court will adopt that construction which it believes to be authorized by law without regard to where the contract was made. *Miss. Valley, &c. R. R. Co. v. U. S. Express Co.*, S. C. Ill., Cent. L. J., January 12, 1877.

COMMISSION.

See BROKERAGE.

COMMON CARRIER.

LIABILITY FOR GOODS SHIPPED BEYOND ITS OWN LINE. — LIMITING LIABILITY BY NOTICE. — A common carrier is not bound to assume responsibility for the transportation of goods beyond the terminal points reached by its own conveyance. It is optional whether the carrier will take upon itself the enlarged responsibility of making the connecting carrier its agent for the transportation of goods, rather than the agent of the shipper. The acceptance of goods delivered for carriage, marked to a point beyond the terminus of the carrier's lines, will be construed *prima facie* as a contract for through transportation. But although the goods may be so marked, the carrier may by express contract limit its obligations so as to bind itself to carry safely over its own lines, or only to points reached by its own carriages, and for safe storage and delivery to the next carrier in the route beyond. A clause in a receipt given to the owner for the goods, restricting the carrier's obligation in this respect, if understandingly assented to by the shipper, will as effectually bind him as though he had signed it. *Erie R. W. Co. v. Wilcox*, S. C. Ill. (two judges dissenting), Chicago L. N., February 17, 1877.

CONSTITUTIONAL LAW.

CONDEMNATION OF LAND FOR MANUFACTURING PURPOSES. — Under the Constitution of Michigan it is not competent for the legislature to provide generally for the condemnation of the lands of non-consenting parties in order to obtain water-power for manufacturing purposes, the statute not undertaking to define the purposes except in this general way, and not making any provision under which the public will have rights as regards the manner in which the power shall be employed. *Ryerson v. Brown*, S. C. Mich., Cent. L. J., February 16, 1877.

CONTRACT.

1. WHEN SEVERABLE. — The rule adopted in *Lucasco Oil Co. v. Brewer* (16 P. F. Smith 31), that where the part of a contract to be performed by one of the parties consists of several and distinct items, and the price to be paid by the other is apportioned to each item, the contract is severable, does not apply when it clearly appears from the face of the contract that the parties intended it to be entire. *Quigley v. De Haas*, S. C. Pa., W. N. C., February 1, 1877.

2. WHERE A CONTRACT NAMES A PERSON AS ARBITER to determine whether work therein contracted for is done in accordance with its provisions, a decision of such arbiter is an indispensable requisite to an action for the price of the work unless such decision is rendered by circumstances impossible, or is waived by the parties. *Ib.*

3. AGREEMENT TO BE SIGNED BY ALL CREDITORS. — ESTOPPEL. — EXECUTION. — An agreement of creditors, reciting that it was made "in consideration that all the said creditors agree hereto," provided for the execution by the debtor of an assignment of his property to trustees for the benefit of the creditors. This agreement was signed by most, but not all, of the creditors. The trustees took possession, and expended a large amount of their own money in the execution of the trust. Subsequently one of the creditors who had signed the agreement obtained judgment on his claim, and issued execution, under which, and under other executions, was sold the personal property in the hands of the trustees. There was no evidence that the creditor knew of the execution of the assignment or the proceedings of the trustees. *Held*, that as against the trustees he was entitled to the proceeds of his execution. *Lane's App.*, S. C. Pa., W. N. C., March 1, 1877.

4. CONTRACTS FOR THE SALE OF GRAIN WHERE THERE IS NO DELIVERY and no delivery is contemplated are wagering contracts and void accordingly. *Lyon v. Culbertson*, S. C. Ill., Chicago L. N., February 24, 1877. But if there is not sufficient evidence to sustain the inference that no delivery was contemplated the contract will be enforced. *Corbett v. Underwood*, *Ib.*, February 17, 1877.

See BILLS AND NOTES; BOND; BROKERRAGE.

ELECTION.

VACANCY. — "DULY QUALIFIED" DEFINED. — In 1868, G. was a candidate for judge, and in January, 1869, claiming to have been elected, entered upon the duties of the office and continued to discharge them until the expiration of the term. In 1874, one M. was duly elected to succeed G., received his commission, and took the oath of office, but died before his term commenced; thereupon the governor issued a writ of election to fill the vacancy, and the respondent was elected and took possession of the office. *Held*, that G.'s successor having been duly elected and qualified, he could not hold over, and that the death of M. created a vacancy which was legally filled by the election of the respondent. *State v. Seay*, S. C. Mo., Cent. L. J., February 16, 1877.

EQUITY JURISDICTION.

POWER OF COURT TO DECREE SALE OF STOCK DEPOSITED AS COLLATERAL SECURITY. — POWER OF ATTORNEY. — A certificate of stock was deposited with complainants as collateral security for a loan of money. The defendant N., who was the owner of the certificate, gave it to D., the other defendant, for the purpose of borrowing money on the security thereof. When the loan fell due, it was discovered that the power of attorney, by which alone the certificate would be transferred upon the books of the company, had been struck out, and neither of the defendants

were aware of it until informed by the complainants. N. refused to re-execute said power of attorney; and the indebtedness remained unpaid. Under these circumstances the court made a decree for the sale of the certificate of stock, and that the proceeds thereof be applied to the payment of the amount due upon the loan. *Johnson v. Dexter*, S. C. D. C., W. L. R., February 19, 1877.

ESTOPPEL.

See BOND, 2; CONTRACT, 3.

EVIDENCE.

1. PAROL EVIDENCE IS ADMISSIBLE TO VARY THE TERMS OF A WRITTEN INSTRUMENT (other than commercial paper) by showing that its execution was procured upon the express agreement that its terms should not be enforced but should be qualified in accordance with a previous and contemporaneous parol agreement of the parties. *Lippincott v. Whitman*, S. C. Pa., W. N. C., February 8, 1877.

2. IT IS NOT NECESSARY, IN ORDER TO PAVE THE WAY FOR THE ADMISSION OF SUCH EVIDENCE, to show that the party procuring the writing was actuated by a fraudulent intent at the time of its execution; it is sufficient if he afterwards seeks to procure an unfair advantage by denying the parol qualification. *Ib.*

3. MECHANIC'S LIEN. — SEPARATE APPORTIONED LIEN. — On the trial of a *scire facias* upon a separate apportioned lien, claimant's book of original entries, containing entries of the items furnished to all the buildings without designating the precise materials furnished to each building, is admissible in evidence. *Millett v. Allen*, S. C. Pa., W. N. C., March 1, 1877.

4. PAPERS SEPARATED AFTER EXECUTION. — PAROL TESTIMONY CONCERNING. — A. agreed with P. to sell him his interest in a partnership; P. agreeing to give notes with approved indorsement in payment, and to give an obligation of indemnity against debts, the settlement under the agreement to be made before a certain day. C. signed a guaranty for the "faithful performance of the covenants on the part of P., in the foregoing agreements set forth." Later, on the same day, P. delivered to A. the agreement of purchase and sale, the bond of indemnity, and C.'s guaranty. The papers were then separated, but were afterwards fastened together. Upon a breach of the indemnity bond, and a suit by A. against C., on the guaranty: *Held*, that evidence of what took place at the signing of the guaranty was admissible to show to what agreement it applied. *Clarke v. Adams*, S. C. Pa., W. N. C., March 1, 1877.

FOREIGN LAW.

See COMITY.

INSURANCE.

1. SURRENDER OF POLICY. — POWER OF AGENT. — The plaintiff, who was insured in the A. company, applied to the agent of that company to

have the insurance placed elsewhere, agreeing to surrender the A. policy. The agent filled in the application for insurance in the H. company in plaintiff's name without his knowledge, and forwarded it. On the day following, the plaintiff surrendered the A. policy to the agent before he had received the H. policy, and probably before it had been received by the agent. The agent had taken the surrender of other policies by direction of the A. company, and had blanks for that purpose. *Held*, that the A. policy was not in force when the H. policy applied, and the warranty in the application for the latter that there was no other insurance was not violated, and that the agent had authority to accept the surrender of the A. policy, and his subsequent failure to forward it to the company did not affect plaintiff's rights. *Train v. Holland, Pur. Ins. Co.*, Ct. App. N. Y., Ins. L. J., January, 1877.

2. THE MASSACHUSETTS STATUTE OF 1861, chap. 186, regulating the non-forfeiture of life policies under subsequent legislation of 1870 and 1872, applies as well to foreign insurance companies as to those incorporated under the laws of the commonwealth. *Morris v. Penn. Mut. Life Ins. Co.*, S. C. Mass., *Ib.*

3. "OTHER INSURANCE" DEFINED. — Where a policy of insurance against fire had in it a condition that "if the assured shall have, or shall hereafter make any other insurance on the property hereby insured, or any part thereof, without the consent of the company written hereon, . . . this policy shall be void." *Held*, that subsequent insurance of the same property against fire in other companies, covering other property of the insured as well, is other insurance; and, if made without the consent of the company, renders the policy void. *Phoenix Ins. Co. v. Mich. So. & No. Ind. R. R. Co.*, S. C. Ohio, *Ib.*

4. MARINE INSURANCE. — DEVIATION. — The policy was "at and from Miramichi, to a port in Cape Breton, and at and from thence to New York, with privilege of carrying coal exceeding her tonnage." The vessel had already cleared for Big Glace Bay, a port in Cape Breton, under a charter that provided that if the captain did not consider it safe to remain and load there, he might be at liberty to proceed elsewhere, and the charter be considered cancelled. The captain proceeded to Sydney, a safe port in Cape Breton, and there finding that Big Glace Bay was an open roadstead, concluded it was unsafe, and proceeded to Cow Bay, a safer port in Cape Breton, and commenced to load. Here a gale tore the vessel from the wharf, and drove her upon the rocks badly damaged, where there was strong probability that she would be compelled to remain during the winter, and be ultimately destroyed. Under advice of a competent survey, the vessel was sold by the master. It was shown to be the custom of coaling vessels to stop at Sydney. *Held*, that stopping at Sydney and then going to the second port was not a deviation. *McCall v. Sun Mut. Ins. Co.*, Ct. App. N. Y., *Ib.*

5. WHERE A VESSEL IS JUSTIFIABLY SOLD, the insured may claim a total loss without abandonment, accounting to the insurer for proceeds of the sale as salvage received for his benefit. *Ib.*

6. APPLICATION FILLED OUT BY MEDICAL EXAMINER. — The duty of a medical examiner is simply to ascertain and report to the company the health of the applicant, by filling up the blank report, and obeying the

instructions furnished him. Authority to solicit or fill up applications is not incident to his agency as medical examiner, nor within the scope of his apparent agency, and the company is not responsible for his act in filling up the application, and advising the insured to make answers which are false. *Flynn v. Eq. Life Ins. Soc.*, *Ib.*

7. RIGHT OF PART OWNER OF VESSEL TO SUE. — A part owner of a vessel, in whose name a policy of insurance on the whole vessel, for account of the owners, is issued, becomes a trustee for all the owners, and in case of loss may sue on the policy in his own name alone. *Knight v. Eureka Fire & Marine Ins. Co.*, S. C. Ohio, *Ib.*

8. PART OWNER OF VESSEL CANNOT INSURE FOR OTHER OWNERS. — A part owner of a vessel has no authority, by reason of the joint ownership, to insure the interest of the other owners; hence, a policy taken upon the whole vessel in his own name, without previous authority or subsequent ratification by the other owners, is invalid, except as to the interest of the part owner obtaining it. Where such policy was intended by the insurer to cover the whole vessel for the benefit of all concerned, but is invalid except as to the interest of the part owner procuring it, the insurer is only liable to such part owner for such portion of the sum insured as his interest bears to the whole. *Ib.*

9. ADDITIONAL INSURANCE. — WHERE A POLICY CONTAINS A CONDITION OF AVOIDANCE on account of additional or over-insurance, such policy is not avoided by a contract for additional insurance, where it is shown that such contract is invalid as to all excessive insurance. *Ib.*

LEX LOCI CONTRACTUS.

See BILLS AND NOTES.

LIMITATIONS.

NON-RESIDENCE. — RUNNING OF THE STATUTE. — The Iowa Code provides that "the time during which a defendant is a non-resident of the state shall not be included in computing any of the periods of limitation." One S. executed a note payable ten months after date, and six months later, a mortgage to secure it. For more than four months after the note became due, the mortgagor was in the State of Iowa, voted at an election, and was engaged in business there, afterwards removing to Pennsylvania, where he died. *Held*, that during the time he was in Iowa his residence was there, and the statute of limitations ran against him. Residence in the state, and not citizenship or domicile, determines the fact of the running of the statute. *Savage v. Scott*, S. C. Iowa, Cent. L. J., January 12, 1877.

MECHANIC'S LIEN.

1. WHERE MATERIALS ARE FURNISHED INDISCRIMINATELY FOR A NUMBER OF HOUSES under an entire contract, the material-man has the right to apportion the amount due on each house and to file separate liens therefor. *Millet v. Allen*, S. C. Pa., W. N. C., March 1, 1877.

2. WHETHER THE RIGHT OF APPORTIONMENT EXISTS where the houses do not adjoin but are situated in different blocks, not decided. *Ib.*

MORTGAGE.

RIGHT OF MORTGAGOR TO INCOME. — The mortgagor is entitled to all profits arising out of the mortgaged premises, until foreclosure. A railroad company is entitled to receive the income of the road until default, and possession taken by trustees under mortgage. *Miss. Valley R. R. Co. v. U. S. Express Co.*, S. C. Ill., Cent. L. J., January 12, 1877.

NUISANCE.

NOISE CAUSED BY THE RINGING OF CHURCH BELLS, if sufficient to annoy and disturb residents of the neighborhood in their homes and occupations, is a nuisance, and will be enjoined. *Harrison v. St. Mark's Church*, Com. Pl. Phila., W. N. C., March 1, 1877.

PARTNERSHIP.

1. DORMANT PARTNER. — **STOCKHOLDER IN UNINCORPORATED BANK.** — The stockholders of a banking association doing business under ordinary articles of copartnership are not dormant partners, although only the name of the bank is disclosed to the public, and not the names of the individual partners. Such stockholders are each equally responsible for the obligations of the association until notice is given of their withdrawal from it. *Hamburg v. Ruggles*, S. C. Pa., W. N. C., February 1, 1877.

2. INCOMING PARTNER. — **ANTECEDENT DEBTS.** — Where, after a new partner had joined a banking association, there was a continuance of business without discrimination between past and future profits, and no separation of past from future effects and liabilities: *Held*, that the incoming partner was not liable for the antecedent debts of the association, unless expressly assumed by him, and that he was not bound to inquire whether all the property in its possession had been paid for; and that the payment of interest on an antecedent deposit, made with the knowledge of the new partner, was not of itself such an assumption of the liability for the deposit as would justify a verdict against him. *Id.*

PLEADING AND PRACTICE.

1. AN OPENING TO THE JURY should state the facts which it is expected to prove, but should not set forth evidence in detail. *Scripps v. Reilly*, S. C. Mich., Cent. L. J., February 9, 1877.

2. REVIEW OF DISCRETIONARY RULINGS BY APPELLATE COURT. — Where the exercise of a court's discretion amounts to an abuse of it that is likely to affect the legal rights of a party, the appellate court will review it, although the abuse resulted from accident, inadvertence, or misconception. So *held*, where counsel were allowed to open a case improperly. *Id.*

See INSURANCE, 7; REMOVAL OF CAUSES.

POWER OF ATTORNEY.

See ASSIGNMENT, 1.

PRINCIPAL AND AGENT.

INDIVIDUAL LIABILITY OF AGENT OF CORPORATION. — An agent of a corporation who enters into a contract under his hand and seal is individually liable thereon, although he is named as agent and the contract is expressly made for the benefit of the corporation. *Quigley v. De Haas*, S. C. Pa., W. N. C., February 8, 1877.

REMOVAL OF CAUSES.

1. REQUISITES OF PETITION. — A petition for the transfer of a suit from the state to a national court, on the ground that it arises under the Constitution and laws of the United States, must state the facts and indicate the questions arising therein which are claimed to give the national court jurisdiction, so that the court can determine for itself from the facts the questions of jurisdiction. A petition which only states the opinion, or conclusion of the petitioner, that the case arises under the Constitution and laws of the United States, is insufficient; and a suit transferred on such petition will be remanded. *Trafton v. Nougues*, C. C. U. S. Cal., Pac. Law Rep., February 13, 1877.

2. WHEN REMOVAL MAY BE MADE. — While a contest before a probate court in regard to the distribution of an estate is a "controversy" which may be removed from a state to a federal court under the Act of Congress of March 3, 1875, it must be removed before trial in the probate court, and cannot be removed after determination by that court and appeal therefrom. *Craigie v. McArthur*, C. C. U. S. Minn., Albany L. J., February 17, 1877.

3. A DEFENDANT MAY RAISE BY ANSWER IN A STATE COURT the question of a loss of jurisdiction by reason of proceeding for removal to a federal court; and if the proceedings are regular and in accordance with the acts of Congress, the state court is *ipso facto* ousted of jurisdiction. *Shaft v. Phoenix Life Ins. Co.*, Ct. App. N. Y., Ins. L. J., January, 1877.

4. PARTIES TO PETITION. — TRUST DEED. — In a suit brought in a state court by the plaintiff corporation to set aside a deed of trust, made by its officers and another corporation of the same state, a removal of the cause to the United States court was sought by the surviving trustee in the deed of trust and one of the bondholders under it. *Held*, that, the latter corporation being a necessary party, and no final or effectual determination of the case made by the bill being possible without its presence, the petitioners could not have the cause removed under the Act of 1866 (Rev. Stat. § 693, clause 2), as to them. *Cape Girardeau, &c. R. R. Co. v. Winston*, C. C. U. S. E. D. Mo., Cent. L. J., February 9, 1877.

5. EFFECT OF ACT OF 1875. — CONSTITUTIONALITY OF ACT OF 1866. — Per Treat, J. That part of the Act of 1866 embraced in clause 2 of sec. 639, Rev. Stat., is repealed by the Act of March 3, 1875, or if this be not so, these provisions of the act must be held to be unconstitutional. *Id.*

STOCK.

See EQUITY JURISDICTION.

SUNDAY.

See VERDICT.

TENDER.

"CURRENT SILVER MONEY OF THE U. S." — A ground-rent created in 1806 was payable in "current silver money of the United States." In 1875 the tenant tendered an instalment of rent in silver dimes: *Held*, that the tender was insufficient, it being payable only in silver money of the United States which at the time of payment is a legal tender for the amount of the rent. *Maule v. Stokes*, S. C. Pa., W. N. C., March 1, 1877.

TESTAMENTARY LAW.

CAPITAL AND INCOME DISTINGUISHED. — Testator's estate held 100 shares in the A. Company, which company had a surplus of \$1,400,000 over its capital, and its stock sold for \$240 a share, par value being \$100. The legislature authorized it to increase its capital stock \$1,000,000. The corporation did this, allowing each old stockholder to subscribe for shares at par. Testator's executors sold part of their right to subscribe, and with the proceeds purchased the balance of the stock they were entitled to at par. *Held*, that this newly purchased stock was part of the capital of the estate, and not income or profits. *Appeal of Mass.*, S. C. Pa., Leg. Int., February 23, 1877.

TRUSTS.

1. WHAT MAY BE MADE THE SUBJECT OF A TRUST. — All property of a valuable nature may be made the subject matter of a trust. This applies as well to trusts resulting by implication of law, as express trusts. Equity will enforce a trust in personal property. *Taylor v. Turner*, S. C. Ill., Chicago L. N., February 17, 1877.

2. COMMISSION MERCHANT. — BILL OF LADING. — DRAFT, ETC. — Appellant was a commission merchant in Chicago; T. was indebted to him, and promised to make shipments in discharge of this indebtedness. After purchasing certain wheat of appellee, in Iowa, he drew upon appellant two drafts in favor of appellee, in part payment of the wheat. The wheat was shipped to appellant, with bills of lading attached to the drafts in the name of T. *Held*, that appellant had no right to retain this wheat in discharge of T.'s indebtedness thus owing him. *Id.*

VERDICT.

A VERDICT RENDERED ON SUNDAY is valid. *Reid v. State*, S. C. Ala., Cent. L. J., February 16, 1877.

NOTES OF NEW BOOKS.

MESSRS. LITTLE, BROWN & Co. have issued a new, the twelfth, edition of *Story's Commentaries*, edited by MR. PERRY, author of *Perry on Trusts*. They have also issued a new, the sixth, edition of *Bishop on Criminal Law*.

MESSRS. T. & J. W. JOHNSON & Co., of Philadelphia, have ready a new edition of *White & Tudor's Leading Cases in Equity*, being the fourth American from the fourth London edition, with notes and references by HON. J. I. C. HARE.

MAXWELL & SON, of London, have published a work entitled *A Systematic and Historical Exposition of Roman Law, in the Order of a Code*. It is written by WILLIAM A. HUNTER, M. A., Professor of Roman Law, University College, London, and embodies the Institutes of Gaius and of Justinian, translated into English by J. ASHTON CROSS.

MESSRS. DIOSY & Co. have issued a little volume by JOHN F. BAKER, Esq., author of a work on the Law of Manufacturing Corporations, touching Supplementary Proceedings, intended to be a supplement to *Riddle's Treatise* on that subject.

The following works are announced as in press or preparation:—

Tudor's Leading Cases on Real Property. From the second London edition, with full Notes and References to American Decisions. By A. SIDNEY BIDDLE, Esq.

Scribner on the Law of Dower. A Treatise on the Law of Dower. By CHARLES H. SCRIBNER, Esq. Second edition.

English Common Law Index. A General Index to the English Common Law Reports, from vols. 84 to 118, the third and last volume of the Index.

Waterman's U. S. Criminal Digest. A Digest of the Criminal Cases decided in the various State and Federal Courts, arranged under titles and sections. Intended to be a complete compendium of American Criminal Law. By THOMAS W. WATERMAN, Esq.

Abbott's Trial Evidence. A Treatise on Evidence at Nisi Prius. By AUSTIN ABBOTT, Esq.

McMaster's Digest of the Law of Railways. This important work, the publishers state, has been delayed by the author, in order to make it the most complete and trustworthy compendium of Railroad Law yet issued.

Sedgwick's Leading Cases in the Law of Damages. With Notes, References, &c. By HENRY DWIGHT SEDGWICK, Esq.

Sprague's Specific Performance of Contracts. By A. P. SPRAGUE, Esq.

Abbott's Law Dictionary. A Dictionary of Terms and Phrases used in American or English Jurisprudence, or which have been defined by adjudication of the Courts.

Bishop's Directions and Forms in Criminal Causes. Together with Notes and Discussions adapted to the Practice of all the States.

THE AMERICAN LAW TIMES.

NEW SERIES. — MAY, 1877. — VOL. IV., No. 5.

NOTES OF OPINIONS, DECISIONS, AND ORDERS

OF THE

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1876.

Monday, March 13, 1877.

No. 807. *Board of County Commissioners of the County of Johnson, plaintiff in error, v. Nathaniel Thayer et al.* In error to the Circuit Court of the United States for the District of Kansas. Mr. Justice Hunt delivered the opinion of the court, affirming the judgment of the circuit court, with costs and interest. This is the affirmance of a judgment recovered against the county on bonds issued in aid of a railroad running through the county, the court holding that the fact that no corporation was named in the proposition submitted to the people was immaterial, inasmuch as the route of the road was named and the condition touching it complied with.

No. 401. *The United States, appellant, v. Arthur Martin.* Appeal from the Court of Claims. Mr. Justice Hunt delivered the opinion of the court, reversing the *pro forma* judgment of the court of claims, and remanding the cause with directions to dismiss the petition. It is held, in this case, that the act of Congress declaring that "Eight hours shall constitute a day's work for all laborers or workmen, &c., employed by or on behalf of the government of the United States," is in the nature of a direction by the United States to its agents, and is not a contract with laborers to that effect, and does not prevent the officers of the government from making agreements with laborers by which the day's labor may be made more or less than eight hours. The act does not prescribe the amount of compensation to be paid for the labor of eight hours or of any other time. Where a laborer has been in the habit of working for the government twelve hours a day at a compensation of \$2.50 per day, and in answer to his request is informed that if he wishes to remain in the service he must continue to work twelve hours per day and receive his pay accordingly, he cannot afterward recover for the additional time over eight hours as a day's labor. When an application is made for the excess of time over eight hours per day, and an allowance is made, and the receiver receipts in full for the account, this is a bar to any future claim.

No. 963. *The United States, appellant, v. Frederick Phistiner.* Appeal from the Court of Claims. Mr. Justice Hunt announced the decision of the court, reversing the judgment of the court of claims, and remanding the cause with directions to enter a judgment in favor of claimant for his mileage, and to dismiss his petition as to commutation for quarters and fuel. In this case it was decided that an officer who is ordered home to await orders under the Consolidating Act of March 3, 1869, from a post at which he is doing military duty, is entitled to mileage while travelling in pursuance of such order, under section No. 1110 of Army Regulations. The case is not controlled by the section providing that when officers are permitted to exchange stations, &c., they must bear their own expenses. The home of the officer to which he is ordered is not a military station. A military station is nearly synonymous with military post. In each case it means, not

an ordinary residence, having nothing military about it except that one of its occupants holds a military commission, but a place where military duty is performed, or stores are kept or distributed, or something connected with war arms is kept or done. There being no exchange of stations, the case is governed by the section named, and the officer is entitled to his mileage. By section 1080 of the regulations, when public quarters cannot be furnished to officers at stations without troops, quarters will be commuted at a rate fixed by the secretary of war, and fuel at the market prices. An officer ordered home to await orders is not entitled to this commutation. His home is not a station within the meaning of the regulation.

No. 961. *The United States, appellant, v. George W. Chilson*; No. 962. *The United States, appellant, v. Edward B. Rheem*; No. 964. *The United States, appellant, v. Frederick M. Lynde*. Appeals from the Court of Claims. Mr. Justice Hunt announced the decision of the court, reversing the judgments of the said court of claims, and remanding the causes with directions to dismiss the petitions.

No. 960. *The United States, appellant, v. Jas. R. Mears*. Appeal from the Court of Claims. Mr. Justice Hunt announced the decision of the court, affirming the judgment of the said court of claims in this cause.

No. 169. *Henry Mers, appellant, v. Jacob A. Conover*. Appeal from the Circuit Court of the United States for the Southern District of New York. Mr. Justice Strong delivered the opinion of the court, affirming the decree of the said circuit court, with costs and interest. The question in this case had relation to the ascertainment of the profits made by the use of a patented invention. Referring to the case of *Mowry v. Whitney*, 14 Wall. 651, the court say:—

"We are not convinced that the rule declared in that case was not followed in this. The patented invention infringed by the defendant was a new and improved machine for splitting kindling wood, and a distinguishing feature of it, perhaps the principal feature, was a device for the automatic feeding of the wood to the reciprocating splitting knives or cutters, by a movable platform or apron carried forward by an endless chain. That device the defendant used, though it is said he used it in another machine, known as Green's. The evidence is full and uncontradicted that an advantage is gained in splitting kindling wood by a machine with that device of at least seventy-five cents a cord over splitting it by hand or without that device. It was in harmony with this evidence the master reported and the court decreed.

No. 180. *George Jerome and F. C. Beaman, assignee & appellants, v. Thomas N. McCarter*. Appeal from the Circuit Court of the United States for the Eastern District of Michigan. Mr. Justice Strong delivered the opinion of the court, affirming the decree of the said circuit court, with costs.

The rule is announced in this case (1.) that in a suit by a junior mortgagee to foreclose a mortgage, prior mortgagees are not necessary parties. (2.) It was insisted that while the property was in the charge of a receiver appointed in a suit brought by S. to foreclose the first mortgage, and therefore, as it is said, was in *custodia legis*, the bill was filed without leave of the court. "If," say the court, "there could under any circumstances be any force in this objection there is none now. Both suits were brought in the same court; these appellants appeared, and cross-examined witnesses, and made no allegation that the suit had been brought without leave until about a year and a half afterwards. It was then too late. They must be held to have acquiesced, and if not, leave of the court to commence and prosecute the suit must be presumed after the orders made to facilitate its progress." (3.) It is held that the appellants, who stand, it is said, in the place of the company, cannot be heard, under the circumstances, to question the order of priority of the liens of the mortgagees upon its property.

No. 120. *The Atlantic De Laine Co. et al., appellants, v. Lucinda James, administrator, &c.* Appeal from the Circuit Court of the United States for the District of Rhode Island. Mr. Justice Strong delivered the opinion of the court, reversing the decree of the said circuit court, with costs, and remanding the cause, with directions to dismiss the complainants' bill. Dissenting, Mr. Justice Clifford. This cause involved only the question of the character of a statement which it was held in the court below was fraudulent.

No. 804. *The American Bridge Company, appellant, v. Max Heidelberg et al., trustees*. Appeal from the Circuit Court of the United States for the District of Kansas. Mr. Justice Swayne delivered the opinion of the court, reversing the decree of the said circuit court, with costs, and remanding the cause with directions to enter a decree in conformity with the opinion of this court. This case was decided upon the authority of *Galveston R. R. Co. v. Cowdrey*, 11 Wall. 460, and *Gilman v. Tel. Co.* 91 U. S. 608, which involved the precise questions presented.

No. 643. *George Chorpennig, appellant, v. The United States.* Appeal from the Court of Claims. Mr. Justice Swayne delivered the opinion of the court, affirming the judgment of the said court of claims. The court affirms the decision of the court below in this notorious case against the claimant. The duty devolved upon the postmaster general, under the act of Congress, is held to be wholly ministerial, and in no sense judicial, or that of any arbitrament. The adjustment having been made under a special law renders it in nowise different from those made daily by the accounting officers of the government, under the general law conferring their powers and prescribing their duties. The idea that the government is concluded by the results at which they may arrive would be regarded as a novelty within and without the several departments.

No. 581. *The Board of Commissioners of the County of Johnson, plaintiff in error, v. Derrick A. January.* In error to the Circuit Court of the United States for the District of Kansas. Mr. Justice Swayne delivered the opinion of the court, affirming the judgment of the said circuit court, with costs and interest. This was a case involving the validity of certain municipal bonds. It is held that the cases heretofore decided cover the points raised. It appeared that the recitals in the bonds referred to the wrong statute, two having been passed having relation to their issue, but this circumstance is treated as of no moment, the provisions of one of the acts having been fully complied with and the municipality having recognized their validity.

No. 116. *R. W. Foster, plaintiff in error, v. Masters and Wardens, Port of New Orleans.* In error to the Supreme Court of the State of Louisiana. Mr. Justice Swayne delivered the opinion of the court, reversing the judgment of the said supreme court, with costs, and remanding the cause with directions to dismiss the petition. It is here held that an act of the State of Louisiana, authorizing the master and wardens of the port to make a survey of the hatches of all sea-going vessels which should arrive at that port, and forbidding such survey to be made by any other persons, is unconstitutional and void, as being a regulation of commerce and undertaking to authorize the performance of a duty exclusively within the control of Congress. Reversed, with directions to dismiss the bill.

No. 937. *The Inman Steamship Company, appellant, v. Edward G. Tinker, acting Captain of Port of New York.* Appeal from the Circuit Court of the United States for the Southern District of New York. Mr. Justice Swayne delivered the opinion of the court, reversing the decree of the said circuit court, with costs, and remanding the case for further proceedings in conformity with the opinion of this court. Mr. Chief Justice Waite did not sit in this cause, and took no part in the decision. In this case the appellee, as captain of the port of New York, required of the company one and a half per cent. per ton upon the tonnage of their three ships upon every arrival of each in the port. The court find the tax to be a duty on tonnage, and, consequently, that it is an unconstitutional exaction. It is not exacted, say the court, for any service rendered; because if the vessel enter the port and immediately take her departure, or load, or unload, or make fast to any wharf, either of these things brings her within the act, and makes her liable to the duty. The charge is irrespective of the *ad valorem* principle, and if either of the vessels were now making her first trip, and one other of the same tonnage were making her last trip, the act would apply the same; the rate of payment and the aggregate amount to be paid would be the same. The act is also discriminative. It applies different rates to different classes of vessels, and to some it applies none at all. A clearer case of the imposition of a tonnage duty than presented here, the court thinks can hardly be imagined. If the law had been passed by Congress instead of the state, and the charge imposed had been expressly designated a duty on tonnage, its character as such could not appear in a stronger light. It is conceded that foreign steamships and other vessels visiting the ports of a state for business purposes may be made liable by the laws of such state for all reasonable and proper port charges; but such charges must not be repugnant to the federal Constitution. The commerce clauses of the Constitution give to Congress the entire control of the foreign and inter-state commerce of the country. They were intended to secure harmony and uniformity in the regulations by which they should be governed. Wherever such goes the power of the nation accompanies it.

No. 173. *John A. Dutcher et al., appellants, v. A. J. Wright, assignee.* Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin. Mr. Justice Clifford delivered the opinion of the court, affirming the decree of the said circuit court, with costs and interest. This was a case in bankruptcy. It is held that in estimating the time within which a petition must be filed as prescribed in section 5013 of the Revised Statutes, the day the petition is filed must be excluded.

No. 798. *The United States, appellants, v. Joseph Smith*. Appeal from the Court of Claims. Mr. Justice Waite delivered the opinion of the court, affirming the judgment of the court of claims. This cause involved questions touching the computation of damages in the court of claims, and it is said that said court exercises the province of a jury and is to be governed accordingly by established rules.

No. 933. *W. O. McClure, plaintiff in error, v. Township of Oxford*. In error of the Circuit Court of the United States for the District of Kansas. Mr. Chief Justice Waite delivered the opinion of the court, affirming the judgment of the said circuit court, with costs. Dissenting, Mr. Justice Hunt. The opinion in this cause will be found in the present issue of the Law Times Reports.

No. 13 (original). *Ex parte Conrad N. Jordan et al., petitioner*. Mr. Chief Justice Waite delivered the opinion of the court, granting the petition for mandamus in this cause. The present petitioners, claiming to be aggrieved by certain specified orders made in the cause previous to their admission as defendants, and also by so much of the final decree as directed the payment of certain designated coupons and receivers' certificates, and by certain other provisions of a decree which are specially stated, on the second day of October, 1876, in open court, prayed an appeal to this court "from so much of such parts of the decree" as they claimed to be aggrieved by. This was denied, for the reason that the court was of the opinion "that the said defendants cannot appeal from the decree, because the bill of complaint herein and the supplemental bill have been taken as confessed as against them." Afterwards the petitioners again applied to the circuit judge for the allowance of an appeal from the same parts of the decree, and tendered good and sufficient security to perfect the appeal, but it was refused. Thereupon application for a mandamus was made to this court which is allowed and the writ directed to be issued.

No. 946. *Peter Melendy et al., plaintiffs in error, v. W. S. Rice*. In error to the Supreme Court of the State of Iowa. Mr. Chief Justice Waite delivered the opinion of the court, affirming the judgment of the said supreme court, with costs. It is held, in this case, that this court will not disturb a judgment which involves only a question of preponderance of testimony as to a matter of fact.

No. 178. *George Q. Erskine, Collector, &c., plaintiff in error, v. Milwaukee & St. Paul Railway Company*; No. 179. *Milwaukee & St. Paul Railway Company, plaintiff in error, v. George Q. Erskine, Collector, &c.* In error to the circuit court of the United States for the Eastern District of Wisconsin. Mr. Chief Justice Waite announced the decision of the court, affirming the judgments of the said circuit court in these causes, each party to pay the costs incident to his writ.

No. 704. *Elisha Ruckman, plaintiff in error, v. W. R. Bergholz*. In error to the Supreme Court of the State of New Jersey. Mr. Chief Justice Waite announced the decision of the court, affirming the judgment of the said supreme court, with costs.

No. 837. *John A. Hayes, plaintiff in error, v. James B. Pecket et al.* In error to the Supreme Court of the State of Louisiana. Mr. Chief Justice Waite announced the decision of the court, affirming the judgment of the said supreme court, with costs.

Monday, March 19, 1877.

No. 910. *Peter Boyle, Secretary of State of Wisconsin, appellant, v. The Continental Insurance Company of City of New York*. Appeal from the Circuit Court of the United States for the Western District of Wisconsin. Mr. Justice Hunt delivered the opinion of the court, reversing the decree of the said circuit court, with costs, remanding the cause with directions to enter a decree dismissing the bill. Decree to be entered *nunc pro tunc* as of the 1st of March instant. Dissenting, Mr. Justice Bradley, Mr. Justice Swayne, and Mr. Justice Miller. In this case the decision of the *Home Insurance Co. v. Morse* is reaffirmed, that an agreement to abstain in all cases from resorting to the circuit courts of the United States is void, as against public policy, and that a statute of the State of Wisconsin, requiring such an agreement, is in conflict with the Constitution of the United States, and void. The present opinion also takes the following grounds: A state has the right to impose conditions to the transaction of business within its territory by an insurance company chartered by another state, if they are not in conflict with the Constitution or laws of the United States. It may entirely exclude such companies from its territory, or, having given a license, may revoke it for good cause, or without cause. The motive or intention of the state is not open to inquiry. The company has no constitutional right to transact its business in such state, and hence its exclusion therefrom, from whatever cause, violates no constitutional right. The Legislature of the State

of Wisconsin enacted, that if any foreign insurance company should transfer a suit brought against it from the state courts to the federal courts it should thereupon become the duty of the secretary of state to revoke and cancel its license within the state. Any action to restrain the secretary of state from so doing for that cause cannot be sustained. Having no constitutional right to do business in the state, the suggestion that the intent of the legislature is to accomplish an illegal purpose is immaterial. The right of exclusion belongs to the state, and the means by which it accomplishes the result are not the subject of judicial inquiry.

No. 744. *Wm. F. Cochran et al., appellants, v. Josiah W. Deener et al.* Appeal from the Supreme Court of the District of Columbia. Mr. Justice Bradley delivered the opinion of the court, reversing the decree of the said supreme court, with costs, remanding the cause for further proceeding, in conformity with the opinion of this court. Dissenting, Mr. Justice Clifford and Mr. Justice Strong. This was a suit to restrain the infringement of patents for a certain process in manufacturing flour having special relation to the bolting, and also for the machinery used. In the court below the bill was dismissed; but it is here held there has been an infringement of the patents for machinery, and the decree is reversed.

No. 100. *Jno. L. Phipps et al., appellants, v. Jno. Sedgwick, assignee*; No. 101. *Barker Place et al., Ex'rs, appellants, v. Jno. Sedgwick, Assignee.* Appeals from the Circuit Court of the United States for the Southern District of New York. Mr. Justice Miller delivered the opinion of the court, affirming and modifying the decree of the said circuit court in conformity with the opinion and decree of this court. These were cases in bankruptcy, in which the assignee obtained judgments against the plaintiffs in error on allegations of fraud and collusion between them and the bankrupts. In the former case the judgment is affirmed. In the latter it is reversed as against the executors of Mrs. Place, the allegations not being sustained.

No. 840. *Albert Conro et al., appellants, v. Chas. S. Crane, et al.* Appeal from the Circuit Court of the U. S. for the Northern District of Illinois. Mr. Chief Justice Waite delivered the opinion of the court, dismissing the appeal for the want of jurisdiction. It is here considered settled, that appeals do not lie to this court from the decisions of the circuit courts made in the exercise of their supervisory jurisdiction under the bankrupt law.

DIGEST OF CASES

PUBLISHED IN EXTENSO IN LATE ISSUES OF AMERICAN LEGAL PERIODICALS.

ABBREVIATIONS.

Albany L. J. — *Albany Law Journal*, Albany, N. Y., WEED, PARSONS & Co.
 Am. Law Rec. — *American Law Record*, Cincinnati, O., H. M. MOOS.
 Am. Law Reg. — *American Law Register*, Philadelphia, Pa., D. B. CANFIELD & Co.
 Cent. L. J. — *Central Law Journal*, St. Louis, Mo., SEYMOUR D. THOMPSON.
 Chicago L. N. — *Chicago Legal News*, Chicago, Ill., CHICAGO LEGAL NEWS CO.
 Ins. L. J. — *Insurance Law Journal*, New York, C. C. HINE, 176 Broadway.
 Int. Rev. Rec. — *Internal Revenue Record*, New York, W. P. & F. C. CHURCH.
 La. L. J. — *Louisiana Law Journal*, New Orleans, La.
 Leg. Chron. — *Legal Chronicle*, Pottsville, Pa., SOL. FOSTER, JR.
 Leg. Int. — *Legal Intelligencer*, Philadelphia, Pa., J. M. POWER WALLACE.
 Mo. West. Jur. — *Monthly Western Jurist*, Bloomington, Ill., T. F. TIPTON.
 N. B. R. — *National Bankruptcy Register*, New York, CAMPBELL & Co.
 Pac. Law Rep. — *Pacific Law Reporter*, San Francisco, Cal., J. P. BOGARDUS.
 Pittsb. L. J. — *Pittsburg Legal Journal*, Pittsburg, Pa., J. W. & J. S. MURRAY.
 W. L. R. — *Washington Law Reporter*, Washington, D. C., JNO. L. GINCK.
 W. N. C. — *Weekly Notes of Cases*, Philadelphia, KAY & BRO.
 West. Jur. — *Western Jurist*, Des Moines, Iowa, MILLS & Co.

ADMIRALTY.

JURISDICTION. — MARINE TORT. — Where the master of a scow took possession of a lighter without authority, used her in getting wood off from the shore of Lake St. Clair to the scow, and neglected to return her; *held*, that a court of admiralty had jurisdiction, and that the scow was liable *in rem* for the conversion. Inasmuch as the lighter was employed in the service of the scow upon navigable waters, she was held liable notwithstanding she was originally seized in a fish-pound staked off from the Detroit River. *The Florence*, D. C. U. S. E. D. Mich., Cent. L. J., March 16, 1877.

See BILL OF LADING.

ALIENAGE.

See CITIZENSHIP.

BANKRUPTCY.

1. **REINSTATING INVOLUNTARY PROCEEDINGS WITHOUT NOTICE, ETC.** — An order reinstating an involuntary proceeding, after its dismissal, without further notice to or appearance by the debtor, is without authority of law, and an adjudication following such reinstatement is absolutely void. If the district court reinstates a proceeding in bankruptcy without notice to or appearance by the debtor, an order passed therein directing a sheriff to pay money to an assignee subsequently elected will not protect the sheriff. *Gage v. Gates*, S. C. Mo., 5 N. B. R. No. 4.

2. **CHATTEL MORTGAGE. — POSSESSION BY MORTGAGEE BEFORE COMMENCEMENT OF PROCEEDINGS.** — An assignee cannot recover the value of the property covered by a mortgagee if the mortgagee took possession before the commencement of the proceedings in bankruptcy, although the mortgage was not properly recorded. *Miller v. Jones*, C. C. U. S. N. Y., *Ib.*

3. **AN ASSIGNEE, TO RECOVER AGAINST A PARTY WHO HAS OBTAINED A PREFERENCE,** must prove that the bankrupt was insolvent, and that, being so insolvent, he procured his property to be seized by defendant with intent to prefer him over the other creditors, and that defendant accepted such preference with reasonable cause to believe that the bankrupt was then insolvent, and also knew that such seizure was made in fraud of the bankrupt law. *Webb v. Sachs*, D. C. U. S. Oregon, *Ib.*

4. **A TRADER IS INSOLVENT** if he is unable to pay all his debts in money as they become due in the ordinary course of business, although it appears probable that he might pay them in full if time is given him for that purpose. *Ib.*

5. **A CONFESSION OF JUDGMENT BY AN INSOLVENT DEBTOR,** actually followed by an execution and seizure of his property, is an unlawful preference within the act, if made with a view to prefer such creditor. The intent to give such preference will be presumed until the contrary is shown. *Ib.*

6. **REASONABLE CAUSE TO BELIEVE THE DEBTOR TO BE INSOLVENT**

is a knowledge of such facts and circumstances in regard to the matter as would put a prudent man upon inquiry. An act done in fraud of the bankrupt act is not necessarily what is known or considered as a fraudulent act, but only something the effect of which is to evade or avoid its provisions. *Ib.*

7. A DISPOSITION OF PROPERTY BY AN INSOLVENT debtor, not made in the usual and ordinary course of business, is *prima facie* evidence of fraud. It is immaterial what the creditor thought or knew about the debtor's intentions in giving the preference, where he had reasonable cause, at the time of taking it, to believe the debtor insolvent. *Ib.*

8. CORPORATION. — BANK. — INSOLVENCY. — DEPOSITS. — CHECK. — THE PORTSMOUTH SAVINGS FUND SOCIETY CASE. — Where an incorporated society which had been a bank of discount, deposit, and circulation in Virginia, ceased its business in 1862 in consequence of public invasion, and in 1865, after publishing that it would make settlements as far as practicable by set-off, undertook no other business than the liquidation of its affairs, in which it was much hindered by stay laws in force until 1869, and where, before completing its settlements, it was thrown into bankruptcy, in June, 1872: *Held*, that the question of insolvency, as against persons with whom it effected settlements, within four months before the bankruptcy, should not be considered as if the society was a trader, merchant, or bank, but with reference simply to whether its liabilities could meet its assets, that being the basis on which all had dealt with it for seven years. Where the deposits due from a society, which for ten years had ceased business as a bank, and ceased to receive deposits, and which for seven years had been in liquidation, have become a commodity, bought and sold in the market like public stocks, and are not paid or payable in money, and are only available by way of set-off in favor of debtors to the society: *Held*, that papers in the form of checks on these depositors are not checks, but mere evidences of the assignment of choses in action in the form of deposits. *Held*, also, that persons who sell such papers in the form of checks are not responsible to the assignee in bankruptcy of the society owing the deposits, for the amounts stated in dollars on the face of the papers called check. *Harmanson v. Bain*, D. C. U. S. E. D. Va., *Ib.*

9. DIVIDEND. — POWER OF REGISTER. — A register has no power to vacate or reopen a dividend for the purpose of paying a claim which was not proved and filed or presented prior to the dividend meeting. A register has no power to vacate or reopen a dividend for the purpose of paying a claim for services rendered to the assignee which was not presented at the dividend meeting. A dividend duly made and filed in court cannot be disturbed except for some error committed by the register apparent from his memoranda and papers on file existing at the time of or prior to the making of the dividend. *In re Smith*, D. C. U. S. W. D. Texas, 15 N. B. R. No. 8.

10. COMPUTING NUMBER OF CREDITORS. — A creditor who has issued an attachment within four months before the commencement of the proceedings in bankruptcy is not to be reckoned in computing the proportion of creditors who must unite in an involuntary petition. *In re Scrafford*, C. C. U. S. Kas., *Ib.*

11. ORAL TESTIMONY TO PROVE AN ASSIGNMENT is not admissible, unless evidence is first given to show that the original or a certified copy thereof cannot be produced. *Burk v. Winters*, S. C. Ark., Ib.

12. A CREDITOR MAY PROSECUTE AN ACTION AGAINST A SURETY for the bankrupt before final distribution, although he has proved the note against the principal. *Gregg v. Wilson*, S. C. Ind., Ib.

13. AN AGREEMENT BETWEEN CREDITORS WHO HAVE RECEIVED PREFERENCES to contribute proportionately such sum as may be necessary to induce other creditors to forbear to put the debtor into bankruptcy, is valid. *Perryman v. Allen*, S. C. Ala., Ib.

14. WITNESS FEES. — EVIDENCE. — THE CLERK'S CERTIFICATE is only *prima facie* evidence of the number of days that a witness attended before the register. The memoranda or entries made by the register may be used as evidence to prove what proceedings have been had before him. A witness is entitled to fees only for the days of actual attendance, and not for the days on which he was ready to attend. *In re Crane*, D. C. U. S. W. D. Tex., Ib.

15. A PROMISE TO PAY A DEBT DISCHARGED BY PROCEEDINGS IN BANKRUPTCY is valid and will support an action. But if it be a conditional promise to pay when able, the plaintiff creditor must show ability as part of his case, and ability to pay means ability after payment of all new debts contracted since the discharge in bankruptcy. *Eckclair v. Galbraith*, Ct. App. Ky., Am. Law Reg., February, 1877.

BILLS AND NOTES.

1. AN AGREEMENT TO FORBEAR SUIT on a preëxisting debt is a sufficient consideration for a note given therefor; and an agreement so to forbear until the maturity of the note will be presumed, in the absence of proof to the contrary. *Holzworth v. Koch*,¹ S. C. Ohio, Am. Law Reg., March, 1877.

2. PARTIAL FAILURE OF CONSIDERATION IS NO BAR TO AN ACTION on a promissory note, but merely entitles the maker to recoupment for damages, or abatement of the plaintiff's demand, to the extent the maker has suffered loss by the failure. *Ib.*

3. PAROL EVIDENCE IS ADMISSIBLE TO SHOW THE CONSIDERATION of a note, and to show that the consideration in whole or in part has failed; but it cannot be received to contradict the terms of the note, or to attach to it conditions. *Ib.*

BILL OF LADING.

1. DEMURRAGE. — RECEIVING CARGO WITHOUT OBJECTION. — ON THE BACK OF A BILL OF LADING WAS PASTED A PRINTED PAPER prescribing the number of lay days and the rate of demurrage to be paid by the "cargo, consignee, or assignee," after their separation. It appearing in evidence that the consignee had received a duplicate bill of lading with a similar printed paper pasted on its back and that he had thereafter

¹ In an interesting note to this case Judge Bennett uses the following language: "Thus it appears we are warranted in believing that upon the principle of the thing, and upon the more recent authorities, a forbearance to sue a bond fide claim, as well as a compromise of a pending suit, is a good consideration for a promise to pay, although in fact or in law the promisee would not have recovered upon his original claim." — EDITOR.

received the cargo without objection: *Held*, that the printed paper was a part of the bill of lading.

In an action on the case by a ship-owner against the consignee of the cargo for demurrage: *Held*, that if the consignee as such had nothing to do with the shipment there would be no privity of contract between him and the ship-owner, and before acceptance of the cargo, the law would imply no contract on his part to pay demurrage; but that the evidence as to acceptance, with any explanatory testimony, should be left to the jury with the instruction that from an acceptance unexplained of goods under a bill of lading containing provisions for demurrage, a contract for payment of this demurrage by the consignee would be implied. *Falkenburg v. Clark*, S. C. R. I., Am. Law Reg., February, 1877.

2. ON THE BACK OF A BILL OF LADING WAS AN INDORSEMENT, "Pay the demurrage to order of Messrs. C. & K.," signed C. P. R., — C. P. R. being the ship's captain. *Held*, that the claim for demurrage could not be assigned by the indorsement so as to enable the assignee to sue in his own name; bills of lading not being negotiable so as to allow the holder to sue at common law, although made thus negotiable by statute in England, and held thus negotiable in admiralty practice in this country. *Held*, further, that this indorsement was to be construed merely as giving authority to receive the demurrage and to discharge the claim therefor. *Ib.*

CITIZENSHIP.

ALLEGIANCE. — DOMICIL. — ALIENAGE. — CITIZENSHIP OF CHILD, ETC. The doctrine of the American courts seems to be that all persons domiciled in this country on the 4th day of July, 1776, and who remained here after the treaty of peace in 1783, became citizens. The English courts have held that the rights of citizenship did not attach until the treaty of peace in 1783, and that all persons domiciled here at that period became citizens. By the common law, allegiance is not a matter of choice. It attaches at the time, and on account of birth. A person may be domiciled in one place or country, and own allegiance to, and be a citizen of another. The fact that plaintiff's grandfather made his permanent domicile in Canada does not, of itself, prove him to be an alien. Even if he was regarded as a British subject, this would not necessarily make him an alien. Under the act of Congress passed in 1802, the citizenship of the child is determined by that of the father. Taking an involuntary part in the War of 1812, and the acceptance of a bounty therefor from the Canadian government, long after he became domiciled in the United States, is not sufficient to deprive one of the rights conferred by Congress. *State v. Adams*, S. C. Iowa, West. Jur., February, 1877.

CONSTITUTIONAL LAW.

1. FRONTAGE METHOD OF ASSESSING COST OF PAVING. — The method of assessing the cost of paving and other similar municipal improvements, in proportion to the frontage of property on the street improved, although sustained, as to closely built up portions of a city, by a long line of decisions, is, when applied to property in suburban districts, in derogation of the constitutional rights of the property holders. The Act of April 2,

1870 (Pennsylvania, P. L. 796), is unconstitutional in so far as it attempts to apply this method of assessment to property in such suburban districts. *Seely v. City of Pittsburg*, S. C. Pa., W. N. C., March 15, 1877; Leg. Int. March, 2, 1877.

2. TITLE OF ACT. — Any expression that calls attention to the subject of an act, although in general terms, is sufficient. *Johnson v. The People*, S. C. Ill., Chicago L. N., March 10, 1877.

CORPORATION.

1. LIMITATION OF FRANCHISE. — A toll-bridge corporation, organized for thirty years, was duly authorized to exact tolls for twenty. *Held*, that, notwithstanding the continued existence of the corporation, no passenger was bound to pay after the twenty years had expired. A board of supervisors had statutory power to prescribe the period for which a bridge corporation might take toll. *Held*, that its authority to limit that period was as great after as before the organization of the company. *Grand Rapids Bridge Co. v. Prange*, S. C. Mich., Cent. L. J., March 9, 1877.

2. RIGHT OF PRIVATE PERSON TO ATTACK SUBSIDIARY CORPORATE FRANCHISES. — The existence of a corporation is independent of annexed franchises, and not affected by their surrender or forfeiture. And although an individual may not dispute corporate existence, nor in a private action take advantage, collaterally, of the forfeiture of that franchise, he may yet question distinct and subordinate annexed franchises. *Ib.*

3. FORFEITURE OF FRANCHISES. — Any one of the distinct annexed franchises of a corporation may be forfeited without disturbing the rest or affecting the corporate existence. *Ib.*

4. WAIVER. — EXPIRED FRANCHISES. — A waiver cannot renew an estate that has expired by limitation. And where a corporation's right to a special franchise is limited to a certain period, it expires with that period, and the fact that the corporation continues to exercise it without interference from the state neither continues nor restores it. *Ib.*

5. THE WORD "PERSON," AS USED IN THE PROVISION OF THE REVISED STATUTES of the United States prescribing penalties for the presentation of fraudulent claims against the government, does not include corporations. *U. S. v. K. P. R. W. Co.*, D. C. U. S. Kas., Cent. L. J., March 23, 1877.

CRIMINAL LAW.

1. VENIRE WITHOUT SEAL. — AN INDICTMENT FOUND BY A GRAND JURY drawn by virtue of *venires*, not having the seal of the court upon them, is illegal and void; and the defect is one which cannot be cured by amendment, or by special act of the legislature. *People v. Fleming*, S. C. Me., Chicago L. N., March 17, 1877.

2. PLEA IN ABATEMENT. — In a criminal case a plea in abatement is sufficient, if it is free from duplicity, and states a valid ground of defence to an indictment in language sufficiently clear not to be misunderstood; that the strictest technical accuracy, such as is sometimes required in purely dilatory pleas in civil suits, will not be exacted. *Ib.*

3. WHERE THERE IS A CONVICTION UNDER SEVERAL COUNTS, the sentence to imprisonment should be for a specified number of days under each count upon which a conviction is had, and the judgment should require that the imprisonment under each succeeding count should commence when it ends under the preceding count, without fixing the day or hour for each or either to commence or end. *Johnson v. The People*, S. C. Ill., Chicago L. N., March 10, 1877.

4. HABEAS CORPUS. — INDICTMENT. — EVIDENCE ALIUNDE. — In the trial upon writ of *habeas corpus*, in a case involving an alleged kidnapping, it is proper to allow the relators to go behind the indictment for the purpose of showing: (1.) The identity of the parties; and (2.) that the relators were indicted for acts alleged to have been done under a requisition of the executive of one of the states of the Union; but it is incompetent in such cases to show that the indictment, upon which the requisition was issued, was procured improperly, or upon insufficient evidence. *United States v. McClay*, C. C. U. S. Neb., Cent. L. J., March 16, 1877.

5. JURISDICTION OF FEDERAL COURTS. — Federal courts have jurisdiction to issue the writ of *habeas corpus* when parties are held in custody under state laws, for acts done by virtue of requisitions by the executive of one state upon the executive of a sister state. *Ib.*

DAMAGES.

See MUNICIPAL CORPORATION.

DEAD BODY.

AFTER THE PROPER INTERMENT OF A BODY THE CONTROL OVER IT RESTS WITH THE NEXT OF KIN. It cannot be transmitted or transferred. Where there were several next of kin in the same degree, and they differed in their wishes as to the disposition of the remains, a bill by the majority to enjoin the others from interfering with the removal of the remains to another place, was dismissed. When a body has been properly buried in a vault, with the consent of all concerned; *quære*, whether even the next of kin can remove it against the will of the vault owner, though the latter be a stranger. *Lowry v. Stitt*, Ct. Com. Pl. Pa., Am. Law Reg., March, 1877.

DEED.

1. SHERIFF'S DEED. — LIMITATIONS. — The statute of limitations does not commence running against a purchaser at an execution sale until the sheriff's deed is delivered to him. *Jefferson v. Wendt*, S. C. Cal., Cent. L. J., March 2, 1877.

2. DELIVERY OF DEED. — Where a deed was made and acknowledged ready for delivery, and the grantee, on being told where the deed was, and requested to call and get it, replied, "All right, I will come and get it," held not to constitute a delivery of the deed. *Ib.*

DOMICIL.

See CITIZENSHIP.

EVIDENCE.

1. MEANING OF WORDS. — CUSTOM. — TERMS OF TRADE. — Though evidence may be given to prove a usage of trade or custom, it is not admissible to prove the meaning of plain English words. Plaintiff bid for and bought at auction a lot of goods. In the catalogue of sale the following conditions were printed: "Descriptions copied from invoices but not warranted," and "Without allowance." Immediately over the description of the goods purchased by plaintiff were the words, "No allowance except for short measure." In a suit against the auctioneers for non-delivery of the goods, defendant called one of their firm and offered to prove by him the meaning of the above expressions. *Held*, that, there being no offer to prove any usage of trade or custom to control or qualify the meaning of the expressions, the offer was properly overruled. — *Lippincott v. Seidenbach*, S. C. Pa., W. N. C., March 22, 1877.

2. IMPEACHMENT OF WITNESS. — WHETHER BELIEVED UNDER OATH. — Where a witness acquainted with the reputation of another for truth and veracity testifies that such reputation is bad, he may be allowed to further testify that from such reputation he would not believe the witness sought to be impeached under oath. The object of such testimony is not to introduce as evidence the opinion of the impeaching witness as to the truthfulness of the witness against whom he testifies, but to enable the jury to ascertain the true character of such reputation as the impeaching witness understands it, and thereby determine the extent to which it ought to discredit the witness. *Hillis v. Wylie*, S. C. Ohio, Mo. West. Jur., March, 1877.

FRANCHISE.

See CORPORATION.

FRAUDULENT REPRESENTATIONS.

ACTION FOR DECEIT. — MEASURE OF DAMAGES. — In an action for damages for deceit in inducing a person, by fraudulent representations, to purchase stock; *held*, that where the representation of the value of a certain invention was accompanied with false representations of the purchase of stock in it by other persons, thereby inducing one to give credit to the representation of value, an action will lie for the fraud, and the measure of damages is the difference between the value of the stock as it was represented to be, and as it is in fact. In such an action it is not necessary to aver or prove that the plaintiff had offered to return the certificate of stock given him; though such an averment would be required in a suit to recover consideration for a contract which had been rescinded. *Miller v. Barber*, Ct. App. N. Y., Cent. L. J., March 23, 1877.

INSANITY.

THE ACT OF SELF-DESTRUCTION CANNOT BE JUDICIALLY REGARDED AS PROOF PER SE OF INSANITY. It is but a fact, together with all other facts in the case, from which the court or jury are to determine the testamentary capacity of the testator, not at the time of committing suicide,

but at the time of the execution of the will in question. The question of "sound" or "unsound mind" must depend upon the facts and circumstances of each particular case. *McElwee v. Ferguson*, Ct. App. Md., Am. Law Reg., February, 1877.

INTOXICATING LIQUOR.

1. COMPENSATION FOR TAKING CARE OF INTOXICATED PERSON. — The Act of February 27, 1873, providing that any one taking care of an intoxicated person may recover a reasonable compensation from the parties causing such intoxication for every day spent in such service, must be construed to authorize such recovery only during the time such person may remain intoxicated; and where the complaint alleged that the plaintiff was compelled to nurse and take care of a person for three months, on account of injuries received while in a state of intoxication, the case is not brought within the eighth section of the statute, because it does not show that the intoxication continued during that time or any part of it. *Krach v. Heilman*, S. C. Ind., Cent. L. J., March 9, 1877.

2. IBID. — PROXIMATE AND REMOTE CAUSE. — The twelfth section of the above act provides that any person who shall be injured in person, property, or means of support, in consequence of the intoxication of any person, shall have a right of action against the party causing such intoxication. *Held*, that, where a husband became grossly intoxicated, and while being hauled home in his wagon received injuries by means of a barrel of salt falling upon him, from which injuries he died, his widow had no right of action under this statute, because the immediate cause of the injury to the plaintiff was the death of the deceased, and his intoxication only the remote cause. *Held*, that a person is answerable for the consequences of his fault only so far as they naturally result from it, and may therefore be foreseen; and that in this case the parties selling the liquor could not have anticipated that, on his way home, the intoxicated man would be fatally injured by the salt barrel. *Id.*

LANDLORD AND TENANT.

LEASE. — DISTRESS. — NOTICE TO QUIT. — SURETY. — A. let a house to B. for one year from June 14, 1872, upon condition that if the tenant remained on the premises after the expiration of the year, the contract was to continue in force for another year, and so on from year to year until legal notice should be given for a removal. During the first year, a legal notice to quit was served upon B.; he, however, remained in possession until April, 1874. In an action against B.'s surety upon the lease, for condition broken: *Held*, that the tenancy was not terminated by the notice to quit, the tenant holding over the second year under the terms of the contract. *McNamee v. Cresson*, W. N. C., March 22, 1877.

LEASE.

See LANDLORD AND TENANT.

MUNICIPAL CORPORATION.

1. DAMAGES. — INJURY BY BUILDING SEWER. — Damages lie against

a municipal corporation for injuries in the nature of a trespass: for example, building a sewer so that private property is flooded. *Ashley v. Port Huron*, S. C. Mich., Chicago L. N., March 3, 1877.

2. SALE OF EARTH TAKEN FROM STREET OF CITY. — A city, for the purpose of paving one of its streets, lowered the grade thereof, and in doing so it became necessary to make excavations and remove a large quantity of the earth in the street, which, not being needed for city purposes, the street commissioner sold the same to a party who removed and used it. In an action to recover the purchase price the purchaser defended, claiming that the city did not own the earth, but that it was owned by the adjoining lot-owners. There was no showing that the earth was of any peculiar value, nor did it appear whether it constituted a part of the original soil, or was earth which the city had previously placed in the street. *Held*, that the defence was not maintainable. *Griswold v. Bay City*, S. C. Mich., Cent. L. J., March 2, 1877.

NATIONAL BANK.

1. USURY. — FORFEITURE. — Whenever a national bank resorts to a suit to recover a debt on which usurious interest has been paid or stipulated for, the forfeiture of the *entire* interest on such debt follows as a necessary result, under the 30th section of the Act of Congress of June 3, 1864. Revised Stats. § 5198. *Overholt v. First Nat'l Bank*, S. C. Pa., W. N. C., March 15, 1877.

2. *IBID.* — WHERE THERE HAS BEEN A SERIES OF RENEWAL NOTES given for the same original debt, the taint of usury in the first follows the descent through the entire line; and in a suit on the last note of the series, the defendant may defalk *all* the interest he has paid from the beginning, and not merely the excess above the legal rate. But usurious interest paid on another and independent note, not in suit, cannot be defalked. *Id.*

NEGLIGENCE.

CONTRIBUTORY NEGLIGENCE BY CHILD. — A boy, nine or ten years old, got on the front platform of a horse-car, on the driver's invitation. Very soon thereafter the driver made the boy get off, without stopping the car, though requested by the boy to do so. The boy was injured, and sued the company for damages. *Held*, that the questions of the boy's capacity and of his contributory negligence in jumping on the car, under the circumstances, were properly submitted to the jury. *Hestonville, &c. R. R. Co. v. Gray*, S. C. Pa., W. N. C., March 15, 1877.

NUISANCE.

NUISANCE DEFINED. — NOISE. — MARBLE WORKS. — STEAM-WHISTLE. — Noises are not *ex necessitate* nuisances, even when disagreeable, and it is only when they are of a character so objectionable as fairly to come within the meaning of that significant term, that a court of equity will interfere to repress or restrain them. Mere noise, unless unusual, ill-timed, or deafening, may not be such a nuisance as to authorize an indictment or an action therefor, even when it interferes with another per-

son's avocations or pursuits. It cannot safely be said that a lawful business, not *per se* a nuisance, reasonably conducted, can in judgment of law be deemed unsuited for any locality, however fastidious and exclusive the habits, tastes, and pursuits of its occupants. The business of cutting and polishing marble by machinery, or otherwise, is not *per se* a nuisance, and may be lawfully carried on without interference from neighbors, unless so conducted as to interfere with the comfortable existence of those who "are reasonable people, able and willing to enjoy life, subject to the inconveniences necessarily resulting from the reasonable use by a neighbor of his own property." People who have extraordinary sensibilities or nervous temperaments—the sick, the afflicted—or those whose refined tastes lead them to prefer complete silence, are not to be selected as best qualified to determine the precise limits of mutual forbearance, or the absolute essentials of comfortable enjoyment. Injunction against the use of machinery for polishing marble, &c., which, while it produced noise, did not perceptibly jar or injure the plaintiffs' building, refused. *Steam-whistle*, conceded by defendants to be a nuisance, enjoined. *Butterfield v. Klaber*, S. C. N. Y., Leg. Int., March 9, 1877.

PLEADING AND PRACTICE.

1. IN TAKING THE TESTIMONY OF A WITNESS DE BENE ESSE UNDER THE REVISED STATUTES of the United States, the witness must be sworn to tell the whole truth, as far as he knows it, respecting the matter in controversy between the parties. It is not sufficient to swear him to tell the whole truth touching such interrogatories as may be propounded to him. If there is a statutory form of oath in the place where witness is examined, that is the form to be used, unless the witness expresses conscientious scruples respecting that form. If he expresses such conscientious scruples, the oath which he regards as binding upon his conscience must be administered to him, and the officer must certify the reason which caused him to vary from the customary or statutory form of oath. *Wilson Sewing Machine Co. v. Jackson*, C. C. U. S. Md., Cent. L. J., March 9, 1877.

2. THE JUDGMENT OF A STATE COURT WILL BE REGARDED BY THE FEDERAL COURTS sitting within the territorial limits of the state in which the same is rendered as a domestic judgment *Owens v. Gotzian*, S. C. Minn., Am. Law Reg., March, 1877.

3. THE SERVICE OF SUMMONS BY A PARTY TO THE ACTION is an irregularity that is waived by the other party unless objected to before the entry of judgment, and it cannot therefore be taken advantage of by a third party when the judgment is attacked in a collateral proceeding. *Ib.*

4. "PARTY TO THE ACTION," as used in sect. 47, ch. 66, p. 456, R. S. Minn., held to extend only to parties named in the proceedings, and not to those who, though interested, do not appear on the record. *Ib.*

See CRIMINAL LAW, 1, 2, 3, 4.

PRINCIPAL AND SURETY.

See LANDLORD AND TENANT.

REMOVAL OF CAUSES.

1. ACT OF MARCH 3, 1875. — TERRITORIAL COURTS. — The Act of March 3, 1875 (II. Sess. 43 Cong. chap. 137), which provides that any suit "now pending or hereafter brought in any state court" of the description therein specified may be removed into a federal court, is not applicable to a suit brought in a territorial court, although, on the admission of the territory as a state, such suit passed into the jurisdiction of a state court. *Culver v. Co. of Crawford*, C. C. U. S. W. D. Ark., Cent. L. J., March 2, 1877.

2. WHEN APPLICATION MUST BE MADE. — Under that act, application to remove a cause must be made to the state court at or before the term in which, according to the local law and practice of the court, the cause could have been finally heard. Accordingly, where issue was joined nearly one month before the end of a term of the state court, and it does not appear but that a final hearing could have been had at that term, an application thereafter made to remove the cause under the Act of 1875 will be denied. *Id.*

SLANDER.

1. WORDS CHARGING A CLERGYMAN WITH DRUNKENNESS, when spoken of and concerning him in his office or calling, are actionable *per se*. *Hayner v. Cowden*, S. C. Ohio, Am. Law Reg., February, 1877.

2. IN AN ACTION WHERE PUNITIVE DAMAGES MAY BE ALLOWED, EVIDENCE of the defendant's pecuniary ability is admissible. It is not error to refuse to charge the jury, that if the defendant believed the charge to be true, though he had not reasonable cause for such belief, they could not award exemplary damages, where there is evidence tending to show that he uttered the words in a wanton and reckless manner. *Id.*

USURY.

THE PLEA OF USURY IS A PERSONAL PRIVILEGE, and if the debtor declines to avail himself of it, no stranger to the transaction can. A second mortgagee cannot plead usury in a prior mortgage, either to defeat or postpone its lien. *Pritchett v. Rollins*, S. C. Kas., Cent. L. J., March 2, 1877.¹

See NATIONAL BANK.

¹ The following is from the opinion of the court: "Can a second mortgagee plead usury in a prior mortgage? Can he do it either to defeat or postpone the lien of such prior mortgage?"

"Authorities are well divided on this question. That he can, is affirmed in Indiana, Pennsylvania, Ohio, New York, Maryland, and New Jersey. *Cole et al. v. Bansemer et al.* 26 Ind. 94; *Greene v. Tyler & Co.* 39 Penn. St. 361; though under the present statute the opposite ruling seems to obtain. *Miners' Trust Co. v. Roseberry*, 2 Law & Eq. R. 478; *Union Bank v. Bell*, 14 O. St. 200; *Brooks v. Avery*, 4 Comstock, 225; *Post v. Dart*, 8 Paige, 640; *Banks v. McClellan*, 24 Md. 62; *Cummins v. Wire*, 6 N. J. Eq. 73.

"That he cannot, is affirmed in Alabama

Connecticut, Illinois, Iowa, Kentucky, Michigan, Missouri, and Vermont. *Cain v. Gimon*, 36 Ala. 168; *Felder v. Varner*, 45 Ala. 429; *Loomis v. Eaton*, 32 Conn. 550; *Adams v. Robertson*, 37 Ill. 45; *Powell v. Hunt*, 11 Iowa, 430; *Huston v. Stringham*, 21 Iowa, 36; *Carmichael v. Bodfish*, 32 Iowa, 418; *Campbell v. Johnson*, 4 Dana (Ky.), 177; *F. & M. Banks v. Kimmel*, 1 Mich. 84; *Ransom v. Hays*, 39 Mo. 445; *Austin v. Chittenden*, 33 Vt. 553. These last two cases were not mortgage cases; but the decisions plainly indicate the judgments of the courts upon the question. See also, 3 Parsons on Cont. 123; *Ladd v. Wiggin*, 35 N. H. 421; *De Wolf v. Johnson*, 10 Wheat. 367; *Green v. Kemp*, 13 Mass. 515."

We incline to the latter view. — EDITOR.

THE AMERICAN LAW TIMES.

NEW SERIES. — JUNE, 1877. — VOL. IV., No. 6.

NOTES OF OPINIONS, DECISIONS, AND ORDERS

OF THE

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1876.

Monday, March 19, 1877.

No. 177. *Geo. A. Thompson, claimant, appellant, v. Chas. F. Bliss et al.* Appeal from the Circuit Court of the U. S. for the Eastern District of Wisconsin. Mr. Justice Swayne delivered the opinion of the court, affirming the decree of the said circuit court, with costs and interest. This is an affirmance of a decree in admiralty holding that the claimant's tug *Margaret*, in towing the brig *Mechanic* into the port of Racine, Wisconsin, conducted the process so carelessly and unskilfully that the brig and cargo were sunk.

No. 685. *Chas. F. Morrill, plaintiff in error, v. The State of Wisconsin.* In error to the Supreme Court of the State of Wisconsin. Mr. Chief Justice Waite announced the decision of the court, reversing the judgment of the said supreme court, with costs, remanding the cause with instructions to enter a judgment reversing the judgment of the circuit court, and directing that court to discharge the defendant from imprisonment. The case is decided upon the authority of *Welter v. State of Mo.* 91 U. S. 275.

No. 184. *Brook Mackall, Sen. & Jr., appellants, v. Alfred Richards et al.* Appeal from the Supreme Court of the District of Columbia. Mr. Chief Justice Waite announced the decision of the court, affirming the decree of the said supreme court in this cause, with costs.

No. 996. *W. H. Clark, plaintiff in error, v. C. R. Hancock et al.* In error to the Supreme Court of the State of California. Mr. Chief Justice Waite delivered the opinion of the court, dismissing the writ of error in this cause for the want of jurisdiction.

It is decided in this case that a motion to dismiss may be made *prior to the return day* of the writ of error.

The court announced the following amendments of the General Orders in Bankruptcy:—

"Amendment of General Order 30, of the General Orders in Bankruptcy, entitled 'Fees and Costs,' under the head of 'Assignees.'

"It being found that, in certain special cases requiring great care and exertion on the part of assignees in bankruptcy, the fees and allowances now provided are insufficient, it is therefore hereby

"Ordered, That, in such cases as are above mentioned, the district judge be, and is hereby, authorized, by and with the advice and concurrence of the circuit justice or judge, to make such additional allowance to the assignee or trustee, or to both or either of them, if there be more than one, as in his judgment shall be a fair and just compensation for his or their services, having regard to the amount of assets, the amount of

labor required, and the special circumstances of the case; and that so much of General Order 30 as conflicts herewith be repealed."

Mr. Attorney General Devens presented to the court the resolutions of the bar on the resignation of Mr. Justice Davis, and moved that they be entered on the minutes; which was so ordered.

Monday, March 26, 1877.

No. 965. *People of New York ex rel. Gallatin National Bank et al., plaintiffs in error, v. The Commissioner of Taxes, &c., City of New York.* In error to the Court of Appeals of the State of New York. Mr. Justice Hunt delivered the opinion of the court, affirming the judgment of the said court of appeals, with costs. The court affirm the validity of the law of New York, providing that the shares of national banks shall be assessed at their full and true value, the same as the assessors would appraise them in the payment of a just debt due from a solvent debtor, without regard to their par value, and hold that the reserve fund was properly included, being as much a part of the property of the bank, and going to fix the value of the shares equally as if it were not called by that name, but remained as a part of the specific bills discounted, or other funds of the bank, undistinguished from the general mass.

No. 680. *Township of Burlington, plaintiffs in error, v. Alfred W. Beasley.* In error to the Circuit Court of the United States for the District of Kansas. Mr. Justice Hunt delivered the opinion of the court, affirming the judgment of the said circuit court, with costs and interest. Dissenting, Mr. Justice Field. In this case it is held, where the statute of Kansas authorized towns or counties to issue bonds to aid in building bridges, in the construction of railroads, water power, or other works of internal improvement, and where another statute declared all custom grist-mills to be public grist-mills, and regulated their management; that bonds issued by a town of that state to aid in the construction and equipment of a steam custom mill owned by an individual were authorized by the statute.

No. 58. *Town of South Ottawa, plaintiff in error, v. Noah C. Perkins*; No. 59. *Board of Supervisors Kendall County, plaintiff in error, v. Augustus T. Post.* In error to the Circuit Court of the United States for the Northern District of Illinois. Mr. Justice Bradley delivered the opinion of the court, reversing the judgments of the said circuit court, with costs, and remanding the causes with directions to award a *venire facias de novo*. Judgments to be entered, *nunc pro tunc*, as of 1st of March, 1877. Dissenting, Mr. Chief Justice Waite, Mr. Justice Clifford, Mr. Justice Swayne, and Mr. Justice Strong. The opinions in these cases appeared in the May No. of the Law Times Reports.

No. 187. *D. Freeman Poole et al., appellants, v. Daniel Tyler, claimant, &c.* Appeal from the Circuit Court of the United States for the Southern District of New York. Mr. Justice Strong delivered the opinion of the court, affirming the decree of the said circuit court, with costs. In this case it is held that the lien for repairs of the appellants upon the ship Edith, claimed by the appellee, had expired before he came into possession of the vessel, six months having elapsed since the repairs, and the ship not being absent at the expiration of that time.

No. 188. *Brook Mackall, Jr., plaintiff in error, v. The Chesapeake & Ohio Canal Company.* In error to the Supreme Court of the District of Columbia. Mr. Justice Miller delivered the opinion of the court, affirming the judgment of the said supreme court, with costs.

No. 185. *Mackall, Jr., v. Chesapeake & Ohio Railroad Company.* In this case it is held that the question of forfeiture by non-user of a privilege granted to a corporation must be determined in a suit by the public authorities, and will not be considered in a suit brought by a private party.

No. 15 (original). *N. W. Casey, Receiver, &c., plaintiff, v. Count Goffredo Galli.* Mr. Justice Swayne delivered the opinion of the court, sustaining the plaintiff's demurrer to defendant's pleas. This was a proceeding by Casey as receiver of the New Orleans Banking Association to enforce the liability of the defendant on his shares of the concern, its assets being insufficient to pay its debts. The defence was that the association was originally under the laws of the state, and that there was no authority given by the state law nor by vote of the stockholders for its transformation into a national banking association. The court held that no authority from the state was necessary to make the change valid, and that the shareholders, when called upon to respond to a liability as such, cannot deny the existence or legal validity of the corporation.

No. 186. *Thomas Collins, plaintiff in error, v. William L. Gilbert et al.* In error to the Circuit Court of the United States for the Western District of Pennsylvania. Mr. Justice Clifford delivered the opinion of the court, affirming the judgment of the said circuit court in this cause, with costs and interest. In this case it is held that transfers of a negotiable instrument, such as a bill of exchange or a promissory note payable subsequent to its date, hold the instrument clothed with the presumption that it was negotiated for value in the usual course of business at the time of its execution, and without notice of any equities between the prior parties to the instrument. Such instruments are commercial paper in the strictest sense, and must ever be regarded as favored instruments, as well on account of their negotiable quality as their universal convenience in mercantile affairs. They may be transferred by indorsement, or, when indorsed in blank and made payable to bearer, they are transferable by mere delivery. In such a case the holder has nothing to do but to prove the signature and introduce the instrument in evidence in the opening of his case, and is not called upon to prove the consideration paid until the opposing party has introduced evidence to prove want of it, or fraud.

No. 119. *The United States, appellants, v. John Young, Trustee, &c.* Appeal from the Court of Claims. Mr. Chief Justice Waite delivered the opinion of the court, dismissing the appeal in this cause. The court decides in this case that it has no jurisdiction to proceed by writ of error to review the decisions of the court of claims, and that it cannot, therefore, bring up the proceedings of said court on certiorari.

No. 68. *Nathan Greenwald et al., plaintiffs in error, v. Penelope Bond, Administratrix, &c.* In error to the Supreme Court of the State of Tennessee. Mr. Chief Justice Waite announced the decision of the court, affirming the decree of the said supreme court, with costs and interest.

No. 18 (original). *Ex parte W. J. Smith et al.* Mr. Chief Justice Waite delivered the opinion of the court, denying the petition for mandamus in this cause. The pleadings in this cause failed to show jurisdiction, and it was dismissed accordingly.

No. 947. *Francis E. Hinckley, late Receiver, &c., appellant, v. The Gilman, Clinton & Springfield Railroad Co.* Mr. Chief Justice Waite delivered the opinion of the court, denying the motion to dismiss this cause.

No. 16 (original). *Ex parte Elisha T. Loring, petitioner.* Mr. Chief Justice Waite announced the decision of the court, denying the petition for mandamus in this cause. In the progress of a suit for the foreclosure of a mortgage executed by the Gilman, Clinton, and Springfield Railroad Company, F. was appointed receiver. On the 8th of April, 1876, a final decree was rendered, under which, on the 10th of June, the mortgaged property was sold and subsequently conveyed to the purchasers. Upon a settlement of the accounts of the receiver a balance was found due from him, for which a decree was entered directing its payment into court on or before October 10. On the 9th of October he prayed this appeal "from the decree against him," which was granted. The complainants now move to dismiss for the reason that the receiver was not a party to the suit. The motion is denied on the authority of *Blossom v. R. R. Co.* 1 Wall. 655.

No. 19 (original). *James T. Easton et al., petitioners.* Mr. Chief Justice Waite announced the decision of the court, granting a rule to show cause, &c., in this case.

No. 17 (original). *The State of New Jersey, complainant, v. The State of Delaware.* Mr. Chief Justice Waite announced the decision of the court, granting a preliminary injunction in this cause.

Monday, April 2, 1877.

No. 182. *The County of Dallas, Mo., plaintiff in error, v. Jno. W. Mackenzie.* In error to the Circuit Court of the United States for the Western District of Missouri. Mr. Justice Hunt delivered the opinion of the court, reversing the judgment of the said circuit court, with costs, remanding the cause with directions to enter judgment upon the demurrer for the defendant below, unless the plaintiff below shall withdraw his demurrer and proceed to trial within such time and upon such terms as the circuit court may direct. In this case it is held, that it does not matter that municipal bonds recite on their face that they were issued in pursuance of law, or that the claimant is a holder for value. If there was actually no authority for their issue the case is the same as that of forgery, and the holder for value is no more entitled to protection than in such a case. Good faith to the person whose name is forged would require his protection against a holder who pays his money for a forged or unauthorized note. So in cases of the issue of municipal bonds, without warrant, good faith requires the protection of the people in a similar manner.

No. 154. *George W. Bowen, appellant, v. Nelson Chase et al.* Appeal from the Circuit Court of the United States for the Southern District of New York. Mr. Justice Bradley delivered the opinion of the court, reversing the decree of the said circuit court, with costs, and remanding the cause for further proceedings in conformity with the opinion of this court. This was a suit in equity brought by Nelson Chase and others against George W. Bowen, having for its principal object the establishing of their title to certain lands in New York city known as the Jumel Property, and to enjoin Bowen from prosecuting certain actions of ejectment, one of which was to recover the property named, and the other to recover lands in Saratoga belonging to the same estate. The court holds that the conveyances to Kingsland and Martin, for value, by Mme. Jumel, after the voluntary appointment in favor of her adopted daughter Mrs. Chase, were valid, being made under her original power of appointment, but that the assignments to Hamilton and Phillipon are ineffective. The decision is, that the appellees are not entitled to have the real estate of which Mme. Jumel died seised appropriated to them in satisfaction of the supposed frauds upon the rights of Mrs. Chase in the Kingsland and Martin conveyances, nothing appearing to show that such frauds were intended or consummated; but that in view of the void conveyances to Hamilton and Phillipon, and of the fact that Mme. Jumel remained in undisputed possession of the property up to the time of her death, they were entirely justified in coming into a court of equity to have them declared void. The decree is reversed as to the effect of the conveyances to Kingsland and Martin, and affirmed as to those of Hamilton and Phillipon, including a perpetual injunction against Bowen, prohibiting him from prosecuting any action or suit for recovery of the particular estate embraced in the appointment made in favor of Mrs. Chase by the deed of 1828. The claim of the appellees to recover of Bowen the sum of \$2,500, alleged to have been obtained by him from one of the Chase grantees by way of a compromise, is held to be utterly groundless.

No. 189. *George & Mary E. Seitz, appellants, v. John T. Mückell.* Appeal from the Supreme Court of the District of Columbia. Mr. Justice Strong delivered the opinion of the court, affirming the decree of the said supreme court, with costs. This was a creditor's bill to reach real estate claimed by the wife of an insolvent. The wife alleged that the property was purchased with money earned by herself, but the court find that the proofs do not show it, and it is said that to hold that conveyances thus taken and thus paid for are sufficient to protect the property against the creditors of an insolvent husband would be making fraud both profitable and easy.

No. 191. *Silas M. Waite, plaintiff in error, v. Geo. S. Dowley, Treasurer, &c.* In error to the Supreme Court of the State of Vermont. Mr. Justice Miller delivered the opinion of the court, affirming the judgment of the said supreme court in this cause, with costs and interest. This was the affirmance of a judgment of the state court, holding that Waite, the cashier of the First National Bank of Brattleboro, was not justified in refusing to return to the clerk of the township of Brattleboro the number of shares held and the amount paid therein in that township, by his assumption that the law directing such returns was unconstitutional and void. The court held that it is competent for the states to require these lists for the purposes of taxation, a right which is conceded by the act of Congress itself, because the returning of the list is not in conflict with any requirement of the banking act.

No. 905. *The National Bank of the Commonwealth of New York City, plaintiff in error, v. The Mechanics' National Bank of Trenton, N. J.* In error to the Circuit Court of the United States for the Southern District of New York. Mr. Justice Swayne delivered the opinion of the court, affirming the judgment of the circuit court, with costs and interest. This was an action to recover interest upon deposits made by the New Jersey Bank with the Bank of the Commonwealth before its failure, and which were not paid on demand. The objection was that suit could not be maintained for the interest after the principal had been paid. The court holds that the claims, when proven to the satisfaction of the controller of the currency, were upon the same footing as if they were in judgment. The amount in arrears was liquidated, and as certain as if it consisted wholly of principal instead of interest. The action was, therefore, properly brought. If it had been in debt, damages would have been awarded for the detention of the debt sued for. The action not being in debt, the same amount was properly included in the mass of damages for which the judgment was rendered.

No. 185. *Benj. Beall & R. F. Baker, appellants, v. E. E. White et al.* Appeal from the Supreme Court of the District of Columbia. Mr. Justice Clifford delivered the opinion of the court, reversing the decree of the said supreme court, with costs, and

remanding the cause, with directions to enter a decree for the appellants, adjudging that the liens of the landlord have priority over the deeds of trust. This was an appeal of the landlords of the St. James Hotel in Washington, from a decree which had given other parties priority in payment out of the effects of the leaseholders over their claims for rent. It is here held that landlords leasing real property in the District of Columbia have a tacit lien upon such of the personal chattels of the tenant upon the premises as are subject to execution for debt, commencing with the tenancy and continuing three months after the rent is due, and until the termination of any action for such rent brought within the three months.

No. 661. *Socrates Huff, plaintiff in error, v. C. W. Doyle et al.* Chief Justice Waite announced the decision of the court, denying the motion to recall the mandate in this cause.

No. 583. *The Town of East Lincoln, plaintiff in error, v. Charles Davenport.* Chief Justice Waite announced the decision of the court granting the motion to strike out continuance, and ordering the plaintiff in error to file printed arguments on or about the 30th of April, or show cause why the stipulation for submission made by its counsel should not be enforced.

Chief Justice Waite announced the following order: Ordered, that the docket of original actions be called on the 23d inst.

Monday, April 16, 1877.

No. 201. *Otis Clapp, Collector, &c., plaintiff in error, v. William P. Mason & C. H. Parker.* In error to the Circuit Court of the United States for the District of Massachusetts. Mr. Justice Hunt delivered the opinion of the court, affirming the judgment of the said circuit court, with costs and interest. In this case it is held that the statute imposing a tax upon the succession to real estate contemplates one duty only upon the death of an owner of real estate, and that at the highest rates prescribed, payable before the successor is entitled to enter into the enjoyment of the estate. And this rule, it is said, requires that the succession shall not be deemed taxable until such time as the successor shall become entitled to the possession.

No. 190. *The County of Scotland, plaintiff in error, v. Joseph T. Thomas.* In error to the Circuit Court of the United States for the Eastern District of Missouri. Mr. Justice Bradley delivered the opinion of the court, affirming the judgment of the said circuit court, with costs and interest. Dissenting, Mr. Justice Miller. Mr. Justice Field did not sit at the argument, and took no part in the decision. In this case the question was whether an authority given to issue municipal bonds in aid of a railroad company was a valid authority to issue them to a different corporation with which it had been consolidated. The county, maintaining that it was not, repudiated the securities. The court held that the amending act which authorized the consolidation was in perfect accord with the general purpose of the original charter of the road to be aided,—the Alexandria and Bloomfield Railroad Company,—and that, as the rights and privileges of this road passed over to the consolidated road, there is no reason why the power given to the county to subscribe to the stock should not continue in force.

No. 104. *The United States, plaintiff in error, v. Annie Fox et al.* In error to the Court of Appeal of the State of New York. Mr. Justice Field delivered the opinion of the court, affirming the decree of the said court of appeals in this cause. This is the case in which Charles Fox, of the City of New York, devised his entire property to the government of the United States, for the purpose of aiding in the discharge of the debt created by the war for the suppression of the rebellion. The surrogate held that the United States could not take real estate under the statutes of New York, and that the will was void as a devise of lands, but that the government could take the personal estate. The instrument was admitted to probate as a will of the personal estate. The court of appeals affirmed this judgment. It is here said that there is no question but that the United States may hold real property in the state whenever needed for the use of the government in the execution of its powers; and that in such a case, if it cannot be acquired by voluntary arrangement with the owners, it may be taken against their will by the government in the exercise of the power of eminent domain; but the power of the state to regulate the tenure of real property within its limits, and the means of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is held to be undoubted. The right of the state in this respect follows from its sovereignty within its limits as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to

the federal government. As the statutes of the State of New York prohibit such devises, there is no power to make them.

No. 411. *Franz A. Muller et al., appellants, v. David Dows et al.* Appeal from the Circuit Court of the United States for the District of Iowa. Mr. Justice Strong delivered the opinion of the court, affirming the decree of the said circuit court in this cause, with costs and interest. This was the affirmance of a decree in foreclosure against the Chicago and Southwestern Railway, the court holding that where the road is located in part within the district whose jurisdiction is invoked, and the mortgage covers the entire property, there is authority for the decree of foreclosure; and it is said that to hold otherwise would be disastrous, not only to those owning the road, but to the holders of bonds secured by the mortgage. Multitudes of bridges, say the court, span navigable streams in the United States which are boundaries of two states, and it cannot be they cannot be sold as entireties by the decree of a court. A vast number of railroads, partly in one state and partly in another, forming continuous lines, have been constructed by consolidated companies and mortgaged as entireties. More than \$100,000,000 may be safely assumed to be invested in mortgages on such roads. In many cases these investments are sufficiently insecure at best: but if such roads can be sold under legal process only in fragments; if, as in this case, where the mortgage is upon the whole line, and includes the franchise of the corporation which made the mortgage, the decree can reach only the part of the road which is within the state; it is plain that the property must be comparatively worthless at the sale.

No. 908. *Chas. T. Cromwell, plaintiff in error, v. The County of Sac.* In error to the Circuit Court of the United States for the District of Iowa. Mr. Justice Field delivered the opinion of the court reversing the judgment of the said circuit court, with costs, and remanding the cause with directions to award a new trial. Dissenting, Mr. Justice Clifford. In this case it is held that where in an action against a county in Iowa upon certain interest coupons attached to bonds issued for the erection of a court-house, it was determined that the bonds were void as against the county in the hands of parties who did not acquire them before maturity for value, and inasmuch as value was not proven, it was adjudged that he was not entitled to recover; such judgment did not estop the holder of other bonds of the same series, and other coupons attached to the same bonds as the coupons in the original action, from showing in a second action against the county, that he acquired such other bonds and coupons for value before maturity. The finding in one action that the plaintiff therein is the holder and owner of coupons in suit does not estop the defendant from showing in another action that the plaintiff prosecuted the first action for his benefit in the second action. The finding only established the fact that such plaintiff held the legal title to the coupons, which was sufficient for the purposes of the action, and was not inconsistent with an equitable and beneficial interest in another. The opinions in this cause are published in the present issue of the Law Times Reports.

DIGEST OF CASES

PUBLISHED IN EXTENSO IN LATE ISSUES OF AMERICAN LEGAL PERIODICALS.

ABBREVIATIONS.

Albany L. J. — *Albany Law Journal*, Albany, N. Y., WREED, PARSONS & CO.
 Am. Law Rec. — *American Law Record*, Cincinnati, O., H. M. MOOS.
 Am. Law Reg. — *American Law Register*, Philadelphia, Pa., D. B. CANFIELD & CO.
 Cent. L. J. — *Central Law Journal*, St. Louis, Mo., SEYMOUR D. THOMPSON.
 Chicago L. N. — *Chicago Legal News*, Chicago, Ill., CHICAGO LEGAL NEWS CO.
 Ins. L. J. — *Insurance Law Journal*, New York, C. C. HINE, 176 Broadway.
 Int. Rev. Rec. — *Internal Revenue Record*, New York, W. P. & F. C. CHURCH.
 La. L. J. — *Louisiana Law Journal*, New Orleans, La.

Leg. Chron. — *Legal Chronicle*, Pottsville, Pa., SOL. FOSTER, JR.
 Leg. Int. — *Legal Intelligencer*, Philadelphia, Pa., J. M. POWER WALLACE.
 Mo. West. Jur. — *Monthly Western Jurist*, Bloomington, Ill., T. F. TIPTON.
 N. B. R. — *National Bankruptcy Register*, New York, CAMPBELL & CO.
 Pac. Law Rep. — *Pacific Law Reporter*, San Francisco, Cal., J. P. BOGARDUS.
 Pittsb. L. J. — *Pittsburg Legal Journal*, Pittsburg, Pa., J. W. & J. S. MURRAY.
 W. L. R. — *Washington Law Reporter*, Washington, D. C., JNO. L. GINCK.
 W. N. C. — *Weekly Notes of Cases*, Philadelphia, KAY & BRO.
 West. Jur. — *Western Jurist*, Des Moines, Iowa, MILLS & CO.

ATTACHMENT.

See BANKRUPTCY, 5.

ATTORNEY.

EMPLOYMENT TO EXAMINE TITLE. — FORECLOSURE OF MORTGAGE. — PAYMENT. — An attorney, employed by a person about to make a loan of money, "to examine the title" of premises upon which a mortgage is to be made, as security for the loan, is not necessarily the agent of the person employing him, to receive money from the borrower, to pay off prior liens and incumbrances, nor is the lender liable for the misapplication of moneys so received by the attorney. The specific employment of an attorney to examine a title does not in itself include the duty or obligation to satisfy liens; it is discharged by truly ascertaining and reporting them. *Graves v. Mumford*, 26 Barb. 94, examined and distinguished. *Josephthal v. Heyman*, S. C. N. Y., Cent. L. J., April 20, 1877.

BANKRUPTCY.

1. THE FEDERAL COURTS HAVE EXCLUSIVE JURISDICTION IN ACTIONS BROUGHT BY THE ASSIGNEE to recover the value of goods fraudulently transferred by the bankrupt. *Bromley v. Goodrich*, S. C. Wisc., 15 N. B. R. No. 7.

2. WHERE A SALE BY AN INSOLVENT DEBTOR HAS BEEN AVOIDED by proper proceedings in the bankrupt court, it is the duty of the state courts to enforce and carry out that decision; but the state courts cannot of themselves annul a sale valid under the laws of the state, where it was made, because fraudulent under the bankrupt law. *Ib.*

3. WHERE PROPERTY WHICH HAS BEEN TRANSFERRED BY A DEBTOR TO HIS CREDITOR BY A SALE VALID UNDER THE STATE LAW is seized by a sheriff under an attachment against such debtor, and, after such attachment, such debtor is adjudged a bankrupt, and the property is taken from the sheriff by the marshal under a warrant from the bankrupt court, and sold by the assignee without any judgment of the bankrupt court that such sale was void, the full value of the property may be recovered in an action for such unlawful taking. *Ib.*

4. IN NORTH CAROLINA THE STATUTE OF LIMITATIONS BEGINS TO RUN against a purchaser of a chose in action at the assignee's sale from the date of the adjudication, and this although the bankrupt himself is the purchaser. *Blackwell v. Claywell*, S. C. N. C., *Ib.*

5. A CLAIM BY A SHERIFF FOR FEES AND EXPENSES IN ATTACHMENT proceedings begun within four months prior to the commencement of pro-

ceedings in bankruptcy will not, as a general rule, be allowed. But where it is conceded that the attachment conserved the property and benefited the general creditors, the court will allow such claim. *In re Jenks*, S. C. Minn., *Ib.*

6. THE LIMITATION WITHIN WHICH A PREFERENCE MAY BE SET ASIDE is four months in voluntary, and two months in involuntary cases. *In re Schoenenberger*, D. C. U. S. S. D. Ohio, *Ib.*

7. A PARTY WHO RECEIVES A PREFERENCE WITH KNOWLEDGE of his debtor's insolvency, and that a fraud on the act is intended, can prove but a moiety of his debt in either class of cases. But where he voluntarily restores to the assignee the preference which he has received, and there is no actual but only a constructive fraud, he will be allowed to share *pro rata* with the other creditors. *Ib.*

8. A MORTGAGE UPON REAL ESTATE EXECUTED IMMEDIATELY BEFORE THE COMMENCEMENT of the proceedings in bankruptcy, in pursuance of a parol agreement made long before that time, is not a preference, and is valid as against the assignee. *Burdick v. Jackson*, S. C. N. Y., *Ib.*

9. AN AGREEMENT WITH A GUARDIAN TO EXECUTE A MORTGAGE inures to the benefit of the infant, and is well executed by a mortgage to the latter. *Ib.*

10. AN AGREEMENT BY A GUARDIAN TO DISCHARGE ONE MORTGAGE AND TAKE A NEW ONE, although he transcended his power in making it, is not absolutely void, but is voidable only at the election of the infant on coming of age, and until so avoided is valid as against the assignee of the mortgagor. *Ib.*

11. IF A CREDITOR IN MAKING PROOF OF HIS CLAIM OMITS to show that the bankrupt has an unsatisfied claim against him, he cannot, when sued by the assignee for the amount of such unsatisfied and omitted claim, plead as a set-off the amount allowed in his proof. *Russell v. Owen*, S. C. Mo., *Ib.*

12. A BANKRUPT WHO MAKES A WILFUL AND FRAUDULENT OMISION from his inventory of some of his assets, contrary to subdivision 6 of section 5182 of the Revised Statutes, may be prosecuted by information. The offence is not an infamous crime within the meaning of that term at common law, and as used in the fifth amendment to the Constitution. *United States v. Block*, D. C. U. S. Or. *Ib.*

13. WHERE A CLAIM ORIGINATED IN CONTRACT, ALTHOUGH FRAUDULENTLY INDUCED, and is prosecuted in an action sounding in damages, it continues to constitute a provable debt, even though the fraud must be proved to entitle the plaintiff to a recovery. Such an action is within the provisions of section 5106 of the Revised Statutes, which prohibits any creditor prosecuting to final judgment any suit founded on a provable debt, until the question of the debtor's discharge has been determined. The fact that the creditors have not proved their claim in the bankruptcy proceedings gives them no right to proceed in the action. *In re Schwarz*, C. C. U. S. S. D. N. Y., *Ib.*

14. THE JOINT ESTATE OF A PARTNERSHIP IS FIRST LIABLE FOR THE PARTNERSHIP DEBTS, and the separate estate of the partners for the separate debts of its individual members, and neither class has a right to go on the fund primarily belonging to the other, until the creditors having preference are fully satisfied. *In re McLean*, D. C. U. S., Del., *Ib.*

15. THE DEBT OF A FIRM WHICH HAS ADVANCED MONEY TO AN INDIVIDUAL MEMBER beyond his share of the capital is a separate debt of the firm as against the partner receiving the same, and the assignee of the firm may prove the debt in bankruptcy. But while such claim may be proven by the assignee of the firm against the separate debtor partner, he cannot be permitted to come upon the separate estate of the debtor copartner for the use of the creditor copartner, until all the joint creditors are fully satisfied. *Ib.*

16. A BANKRUPT CREDITOR PARTNER has no such equitable claim to his share in the separate estate of his debtor copartner as that he can absolutely transmit it to his assignee in trust for himself, until all the firm creditors are satisfied. *Ib.*

BILLS AND NOTES.

CONDITION THAT NOTE IF PAID WHEN DUE MAY BE PAID IN CURRENCY. — Where a note provides for payments in gold coin, but a subsequent provision in the note provides that in case the note is paid when due the payment might be in any lawful money of the United States: *Held*, that if not paid when due the court should render a judgment payable in gold coin. *Churchman v. Martin*, S. C. Ind., Mo. West. Jur., May, 1877.

See CONSTITUTIONAL LAW.

BILL OF LADING.

NEGOTIABILITY. — BROKER. — PRINCIPAL AND AGENT. — D., a broker in St. Louis, bought meat for M. in Philadelphia, for \$13,000, M. advancing \$5,000 as margin, and D. raising the balance of the purchase money himself by hypothecating the warehouse receipt. M. having requested a shipment of a portion of the meat, D. shipped two car loads, drew on M. for \$3,600, and procured one S. to discount the draft, indorsing to S. as security therefor the bill of lading. M. received and sold the meat, but refused to accept the draft, alleging that it was for a larger amount than the proportion due upon the shipment and for more than the amount due by him to D. In an action of trover by S. against M. for the value of the meat: *Held*, that no property in the meat passed to M. until payment of the draft, and S. was therefore entitled to recover. *Miller v. Sav. Ass'n*, S. C. Pa., W. N. C., April 5, 1877.

See COMMON CARRIER.

BROKER.

See BILL OF LADING.

BUILDING ASSOCIATION.

1. PLEDGE OF SHARES. — USURY. — When a member of a building association obtains an advance upon a pledge of his shares, agreeing to pay legal interest for its use, and besides to pay two dollars a month on each of his shares until their whole nominal value has been paid, the contract is lawful, and is not usurious. *Mulloy v. Fifth Ward Building Association*, S. C. D. C., W. L. R., April 16, 1877.

2. **EXCESSIVE FINES. — EQUITABLE JURISDICTION.** — Where fines at the rate of ten per cent. per month are imposed, upon default being made in paying the monthly dues, chancery will interpose to prohibit the collection of these penalties, and will restrain a sale of real estate by virtue of a deed of trust given to secure the amount advanced, when the account between the parties shows that nothing is owing the society except the fines. *Ib.*

COMMON CARRIER.

NON-DELIVERY OF GOODS AT APPOINTED PLACE. — NEGLIGENCE. — BILL OF LADING. — LOSS FROM FLOOD. — A railroad company undertook to transport certain machinery to a station upon its line. The machinery arrived safely at the station to which it was marked, and there remained unloaded in the car for about a month. It was then taken by a lateral railway to a private platform, situated on the bank of a river about half a mile from the station, which was used by the company for storage, under an arrangement with its owner. There the machinery was unloaded and stored to await the action of the consignees. Ten days after being thus placed, the platform, and with it the machinery, was swept away by an unusually heavy flood, and the machinery was lost in the river. *Held*, that this was a case of non-delivery by the common carriers at the appointed place of destination, and a breach of the contract set forth in the bill of lading which rendered them liable for the loss of the goods. *P. R. R. Co. v. Mitchell*, S. C. Pa., W. N. C., May 3, 1877.

CONFLICT OF LAWS.

1. **A COVENANT OF SEISIN** does not run with the land. *Bethel v. Bethel*, S. C. Ind., Cent. L. J., March 30, 1877.

2. **A DEED, MADE BETWEEN CITIZENS OF INDIANA, OF LAND SITUATED IN MISSOURI**, contained no covenant of seisin except the words "grant, bargain, sell, and convey," which, by the laws of Missouri, implied a covenant of seisin, but by the laws of Indiana did not: *Held*, that such a covenant being a personal one was governed by the laws of Indiana. *Ib.*

See MARRIAGE.

CONSTITUTIONAL LAW.

1. **STATUTE FORBIDDING CONTINGENT FEE. — BILLS AND NOTES.** — The Act of March 10, 1875, which provides that all provisions in notes, bills, &c., for attorneys' fees, dependent upon conditions shall be void, is not unconstitutional. Hence that part of a note providing for ten per cent. attorneys' fees in case suit is brought, is void. *Churchman v. Martin*, S. C. Ind., Mo. West. Jur., May, 1877.

2. **MEANING OF THE WORD "DAY."** — Where a constitution provides for an election to fill a vacancy in the office of judge "at the first election that occurs more than thirty days after the vacancy shall have happened," the word "days" must be taken to be used in its ordinary meaning; and therefore neither the day on which the vacancy happens nor the day of the election can be included in computing the time. *State v. Brown*, S. C. Minn., Am. Law Reg., April, 1877.

CONTRACT.

CONSTRUCTION. — NOTICE TO BAILEE BY STRANGER NOT TO DELIVER, ETC. — A. received of B. certain moneys, in consideration of which he agreed to run into the Williamsport Boom 2,500 logs, which logs were to remain under the control of B., who was to saw them, sell the lumber, and after paying all bills for boomage, interest on advances, and retaining five per cent. commission on sales, was to pay the balance of the proceeds of the lumber to A. : *Held*, that the property in the logs did not pass to B. by this agreement, and that A. might afterwards prosecute an action of trover against the Boom Company for their conversion. *Susq. Boom Co. v. Rogers*, S. C. Pa., W. N. C., April 5, 1877.

See BILLS AND NOTES.

CORPORATION.

1. A BOARD OF DIRECTORS OF A CORPORATION HAVE NO POWER TO MAKE OR AMEND THE BY-LAWS UNLESS authority so to do be specially given them by the charter. In the absence of such authority the power is lodged in the corporation itself, and can only be exercised by its members as a body acting in their corporate capacity. *United Fire Assur. Co. v. Aenseman*, S. C. Pa., W. N. C., May 3, 1877.

2. THE PROPER MODE OF TESTING THE LEGALITY OF AN ELECTION OF A BOARD of directors is by *quo warranto* and not by *mandamus*. *Ib.*

DEED.

See CONFLICT OF LAWS; DIRECT TAX LAW.

DIRECT TAX LAW.

VALIDITY OF DEED. — TAX DISTRICT. — A tax deed under the act of Congress for the collection of direct taxes within insurrectionary districts (U. S. Stat. at Large, p. 422), which provided that the deed should be evidence of the regularity and validity of the sale, should be defeated only by proof of non-subjection to taxation, payment of the tax, or that the land had been subsequently redeemed, can be avoided in no other way. Irregularities will not affect the validity of the title, provided the proceedings are colorable and free from fraud, accident, or mistake. A city, township, or subordinate taxing district within which military authority shall have been established, constitutes a district for the purpose of taxation, although not a parish, district, or county within the meaning of the law of the state. *Sharpleigh v. Surdam*, C. C. U. S. W. D. Tenn., West. Jur., April, 1877.

EASEMENT.

WAYS OF NECESSITY, ETC. — M. C. owning a tract of land bounded N. by a street, conveyed to D. the west portion, whereon was a well, reserving a right to use the well by the words, "excepting a privilege to the well of water on said lot which I reserve for the use of my said homestead estate," this homestead estate being the remainder of the tract. Subsequently M. C. devised to J. in fee simple the land between the house

and the lot conveyed to D., together with a tenement in the house, and to S. the rest of the homestead estate. For a long period, but not for the time required to gain an easement by prescription, all the occupants of the homestead estate had crossed the land between the homestead and D.'s lot on their way to the well. In trespass *quare clausum* brought by the grantees of J. against S., *held*, that the way across J.'s lot could not be claimed as a way of strict necessity. *Held*, further, that the way could not be implied from the circumstances of the case as one reasonably necessary. *O'Rorke v. Smith*, S. C. R. I., Am. Law Reg., April, 1877.

EVIDENCE.

WIDOW. — IN A SUIT RESPECTING A DECEDENT'S ESTATE his widow may testify as to any matters her knowledge of which was not acquired in a confidential relation as the wife of decedent. *Conrad v. Conrad*, S. C. Pa., W. N. C., May 3, 1877.

See INSURANCE, 2, 3.

HUSBAND AND WIFE.

See EVIDENCE; MARRIAGE.

INFANT.

See NEGLIGENCE, 3.

INSURANCE.

1. ASSIGNMENT OF POLICY. — A person cannot purchase and take an assignment to himself, for his own benefit, a policy of life insurance so as to vest the title in himself, unless he has an insurable interest in the insured. But after the death of the insured the policy may be assigned. *Franklin Life Ins. Co. v. Cone*, S. C. Ind., Ins. L. J., February, 1877.

2. IT IS IMPROPER TO ADMIT IN EVIDENCE THE LETTERS OF THE COMPANY'S SECRETARY to the widow of deceased, tending to show that the company was not liable, and had waived a forfeiture, without first showing that the adjustment of losses was within the scope of his authority, or that his letters had been ratified by the company. *Ib.*

3. REFORMATION OF POLICY. — EVIDENCE. — PLEADING. — MISDESCRIPTION, ETC. — The phrase in a policy, "occupied as a dwelling," is ordinarily a warranty that the building is, at the time of issuing the policy, occupied in that way only. The words having a fixed legal construction, the insured cannot in an action at law vary their purport by parol evidence. But parol evidence tending to show that the insured sought to have the phrase corrected to correspond with the facts, and was dissuaded by the insurer, may be admitted to estop the insurer from alleging the misdescription as a bar to recovery. Such evidence may also be received if it tends to make a case in equity for a reformation of the policy. Where the pleading contains no specific allegation of a mistake of fact, but avers that which shows that the parties were mistaken as to the effect of the language they used: *Held*, that this is sufficient averment of matter upon which a reformation of the contract may be based. Evidence showing

that the insurer and insured meant to insure the building that was burned, but by a misconception as to the meaning and effect of the language used terms in the policy which misdescribed it, and exonerated the company from legal liability, makes a proper case for reformation of the contract. An action may be brought for reformation of the contract, and for a recovery at the same time upon the contract when reformed, and it is not irregular to try such action before a judge and jury. The insured asserted, and swore in the preliminary proof, that the building was occupied as a dwelling only, which was not true. The policy provided that any fraud or false swearing should forfeit all claims under it. *Held*, where the occupation was given in the same form of words as in the policy, where it was a misdescription through mutual mistake, authorizing a reformation of the contract, that there was not fraud or false swearing within the meaning of the policy. Such proofs are sufficient compliance. *Maier v. Hibernia Ins. Co.*, Ct. App. N. Y., *Ib.*

4. OMISSION TO GIVE INFORMATION A QUESTION FOR THE JURY. — Where the evidence, taken in connection with the answers, left it a fair question for the jury whether the insured could be charged with an omission to give information, which constituted a fraudulent suppression of the truth and vitiated the policy, a refusal to allow the questions to be submitted to the jury was error calling for reversal of judgment. *Edington v. Mut. Life Ins. Co.*, *Ib.*

5. WARRANTY AND MISREPRESENTATION. — KNOWLEDGE OF AGENT. — A misrepresentation in the absence of fraud must be in respect to some circumstance material to the risk in order to avoid the policy, while a warranty must be literally true, whether material or not; the materiality is not to be considered. Where the policy stipulated that if any of the statements or declarations in the application proved in any respect untrue, it should be void, and the applicant answered that he was aware that any untrue answers in the application would avoid the policy. *Held*, that the answer of the insured that he had never had certain diseases was a warranty, and a knowledge of its falsity by the agent would not relieve from the consequence of the breach. *Bartean v. Phoenix Mut. Life Ins. Co.*, *Ib.*

6. WHETHER OR NOT A HOUSE IS "OCCUPIED," is a question of fact for a jury. Mere temporary absence is not enough to avoid a policy which provides that it shall become void if the house becomes vacant. *Cummins v. Agricultural Ins. Co.*, Ct. App., *Ib.*

JUDGMENT.

See SUBROGATION.

JURISDICTION.

See BANKRUPTCY, 1, 13.

LEASE.

COVENANT TO RENEW. — EXECUTION WHERE RENTAL TO BE FIXED BY ARBITRATION. — A lease of certain real property in St. Louis was made for ten years with a covenant by the lessor for periodical renewals

extending through terms aggregating a period of 500 years; the amount of the rental at the end of each ten years was to be ascertained by assessors to be appointed by the parties; the lessor fraudulently sought to evade the provisions of the lease in respect to renewal; the lessee, on the faith of the covenant for renewal, had expended in buildings on the demised premises \$118,000; the lessor sued the lessee at law for use and occupation, whereupon the lessee filed this bill in equity to stay the action at law until the lessor appointed an assessor as required by the lease: *Held*, that a general demurrer to the bill should be disallowed; and the lessee being willing to comply with the lease as to renewal, the court entered an order staying the proceedings at law, until the lessor should appoint an impartial assessor to make the valuation, reserving the right to discharge or modify the order as justice might require. *Tscheider v. Bidde*, C. C. U. S. E. D. Mo., Cent. L. J., April 6, 1877.

MARRIAGE.

1. DOMICIL. — CONFLICT OF LAWS. — Although a marriage between a negro and a white person is allowed in South Carolina, and although such a marriage is there entered into according to the formalities of that law, yet if it be between parties then domiciled in North Carolina, who went into South Carolina to contract such a relation in evasion of the laws of North Carolina, which declare such a marriage void, it will be held void in the latter state. *State v. Kennedy*, S. C. N. C., Cent. L. J., April 27, 1877.

2. IBID. A marriage contracted in South Carolina according to the forms of her laws and not prohibited by them, between a negro and a white person domiciled there, will be held valid in North Carolina when such persons remove into the latter state, notwithstanding that such a marriage is in terms declared void by a statute of North Carolina. *State v. Ross*, *Ib*.

MORTGAGE.

1. MORTGAGE TO SECURE FUTURE ADVANCES. — RIGHTS OF SUBSEQUENT PURCHASER OR INCUMBRANCER. — 1. Where the mortgagee has bound himself to make advances or incur liabilities, such advances when made relate back, and the mortgage will be a valid lien against subsequent purchasers or incumbrancers with notice of the mortgage. 2. But where there is no obligation on the mortgagee and such advances are merely optional with him, and he has actual notice of a subsequent conveyance of the mortgaged premises before making such advances, his lien will not hold as against the subsequent purchaser. 3. A., B., and C., partners, mortgaged their partnership property to D., in consideration that he would subsequently indorse the paper of C. to the amount of \$4,000; and afterwards C. sold his interest in the mortgaged property to A. and B., of which D. had notice at the time; and D. afterwards, in pursuance of the terms of the mortgage, indorsed C.'s paper to the amount specified which he was compelled to pay: *Held*, D. had a valid lien on the mortgaged premises to the extent of his loss. *Brinkmeyer v. Browneller*, S. C. Mo., Cent. L. J., April 20, 1877.

2. WHERE SUCH MORTGAGEE BY VIRTUE OF THE MORTGAGE OBTAINS

ADDITIONAL SECURITY for an already existing liability, it is a valid and sufficient consideration for his promise to make such future indorsements, and it is not optional with him, but there is a legal obligation on him, to perform his agreement. *Ib.*

See ATTORNEY; BANKRUPTCY, 8.

NEGLIGENCE.

1. THE KEEPING OF A VICIOUS DOG NEAR A PUBLIC HIGHWAY, endangering the safety of persons passing thereon, is a nuisance, operating as an obstruction, and renders the person knowingly keeping it there liable to an action by any person injured thereby. Such unmistakable evidence of a vicious propensity on the part of a dog may be shown by one instance of aggression as to make his owner, who had notice thereof, liable for any subsequent act of a similar character. And in such case it is not necessary that the previous act of aggression should be precisely similar to that on which the action against the owner is founded, if it indicated a disposition to commit injuries substantially like those which form the basis of the cause of action. In an action against the owner of a dog for an injury occasioned by its vicious act, it is not admissible for the owner to prove the general good behavior of the dog, unless there be a conflict of testimony in regard to the act of aggression, in which case the general conduct and habits of the dog may be considered in determining the credit to be given to the witnesses. *Mann v. Wieam*, S. C. Pa., W. N. C., May 3, 1877.

2. THE NEGLIGENCE OF A DRIVER OF A WAGON IN DRIVING WITH INSUFFICIENT HARNESS will not be imputed to a passenger riding in the wagon, and is no defence to an action for injuries to the passenger caused by the frightening of the horses through the negligence of the defendant. *Ib.*

3. TRESPASS BY INFANT. — A., the owner of a private alley abutting on a public highway, had constructed in it a movable platform twenty-four feet back from the street. At the entrance of the alley were gates, with the words thereon "Private" and "No admittance." The platform weighed eight or nine hundred pounds, and worked upon a hinge projecting from the wall. When it was raised it rested against the wall, and was counterpoised simply by its own weight. On one occasion, the gates being open, B., a child of six years, went into the alley and pulled over the platform, thereby receiving injuries from which he died. In an action against A. by the parents of B.: *Held*, that the question of defendants' negligence was properly submitted to the jury to determine under all the circumstances of the case. *Phila. Hydr. Works Co. v. Orr*, S. C. Pa., *Ib.* April 26, 1877.

4. LIABILITY OF ONE WHO STORES WATER ON HIS OWN LAND. — ACT OF GOD. — One who stores water on his own land, and uses all reasonable care to keep it safely there, is not liable for damages effected by an escape of the water, if the escape be caused by the act of God, or *vis major*; *e. g.* by an extraordinary rainfall, which could not reasonably have been anticipated, although, if it had been anticipated, the effect might have been prevented. On the defendant's lands were ornamental pools containing large quantities of water. These pools had been formed by damming up with

artificial banks a natural stream which rose above the defendant's land and flowed through it, and which was allowed to escape from the pools successively by weirs into its original course. An extraordinary rainfall caused the stream and the water in the pools to swell, so that the artificial banks were carried away by the pressure, and the water in the pools, being thus suddenly let loose, rushed down the course of the stream and injured the plaintiff's adjoining property. The plaintiff having brought an action against the defendant for damages, the jury found that there was no negligence in the maintenance or construction of the pools, and that the flood was so great that it could not reasonably have been anticipated; though, if it had been anticipated, the effect might have been prevented. *Held*, affirming the judgment of the court of exchequer, that this was in substance a finding that the escape of the water was caused by the act of God, or *vis major*, and that the defendant was not liable for the damage. *Rylands v. Fletcher*, Law Rep. 3 H. L. 330, distinguished. *Nichols v. Marshland*, Ct. App. Eng., Cent. L. J., April 6, 1877.

NOTES OF NEW BOOKS.

Institutes of Common and Statute Law. By JOHN B. MINOR. Second edition, revised and corrected. Sold by McKENNIE & SON, University of Virginia.

Professor Minor's Institutes may be fairly classed among the books of the law that are destined to last. It has been heretofore appreciated chiefly by those who have enjoyed the privilege of personal intercourse with the author. The present edition, however, will be large enough to supply the general demand.

The title of the work imports its nature. It is narrow only in that it treats of the Statutes of Virginia, and not of statute law generally. Barring this feature, it is in the broadest sense comprehensive. The work is to be commended to the old lawyer no less than the young, and merits a much larger sale than it will ever have.

The Law of Mines, Minerals, and Mining Water Rights. San Francisco: SUMNER WHITNEY & Co. This work, although hardly what it might have been in some respects, will be appreciated. It is confined narrowly to the subjects enumerated in its title.

A Commentary on the Law of Evidence in Civil Issues. By FRANCIS WHARTON, LL. D., author of Treatise on Conflict of Laws, Medical Jurisprudence, Negligence, Agency, and Criminal Law. In two volumes. Messrs. Kay & Brother, of Philadelphia, are prepared to fill orders.

THIRD OTTO has been published. It would seem that the omission of arguments of counsel is not likely to materially reduce the number of volumes to a term.

THE AMERICAN LAW TIMES.

NEW SERIES. — JULY, 1877. — VOL. IV., No. 7.

NOTES OF OPINIONS, DECISIONS, AND ORDERS

OF THE

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1876.

Monday, April 16, 1877.

No. 192. *Thomas M. Davis, Receiver, &c., plaintiff in error, v. H. W. & J. G. Brown.* In error to the Circuit Court of the United States for the Northern District of Illinois. Mr. Justice Field delivered the opinion of the court, affirming the judgment of the said circuit court, with costs. Dissenting, Mr. Justice Clifford. It is here held that an indorser of a promissory note is a competent witness to prove an agreement in writing made with its holder, at the time of his indorsement, that he shall not be held liable thereon, where the paper has not afterward been put into circulation, but is held by the party to whom the indorsement has been made. Such agreement is equivalent, so far as the holder is concerned, to an indorsement without recourse to the indorser. Also, that when a judgment in one action is offered in evidence in a subsequent action between the same parties upon a different demand, it operates as an estoppel only upon the matter actually at issue and determined in the original action, and such matter, when not disclosed by the pleadings, must be shown by extrinsic evidence.

No. 184. *Nathan C. Russell, appellant, v. Isaac V. & John W. Place.* Appeal from the Circuit Court of the United States for the Northern District of New York. Mr. Justice Field delivered the opinion of the court, affirming the decree of the said circuit court, with costs. Dissenting, Mr. Justice Clifford. In an action at law for damages for the infringement of a patent for an alleged improvement in the preparation, which patent contains two claims: one for the use of fat liquor generally in the treatment of leather; and the other for a process of treating bark-tanned lamb or sheepskin, by means of a compound composed and applied in a particular manner, the declaration alleged, as the infringement complained of, that the defendants had made and used the invention, and caused others to make and use it, without averring whether such infringement consists in the simple use of fat liquor in the treatment of leather, or in the use of the process specified. It is held that the judgment recovered in the action does not estop the defendant in a suit in equity by the same plaintiff for an injunction, and on accounting for gains and profits, from contesting the validity of the patent; it not appearing by the record, or being shown by extrinsic evidence, upon which claim the recovery was had. The validity of the patent was not necessarily involved, except with respect to the claim which was the basis of the recovery. A patent may be valid as to a single claim, and invalid as to others. If upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered in evidence.

No. 202. *Thomas G. Tate & wife et al., appellants, v. M. O. H. Norton et al.* Appeal from the Circuit Court of the United States for the Eastern District of Arkansas. Mr. Justice Swayne delivered the opinion of the court, affirming the decree of the said cir-

cuit court, with costs. This was an affirmance of a decree against the administration of an estate in Arkansas, the court holding that the decree did not err in ordering a sale of the entire estate to satisfy a debt against it, because it was not shown that less than the whole would yield a sum sufficient to meet the requirements of the decree.

No. 197. *John B. Crim, appellant, v. James M. Handley et al.* Appeal from the Circuit Court of the United States for the Southern District of Georgia. Mr. Justice Clifford delivered the opinion of the court, affirming the decree of the said circuit court in this cause, with costs. In this case it is said that courts of equity will not enjoin judgments at law unless the complainant has an equitable defence to the cause of action of which he could not avail himself at law, because it did not amount to a legal defence, or where he had a good defence at law of which he was prevented from availing himself by fraud or accident unmixed with negligence of himself or agents.

No. 204. *E. G. Maclay et al., plaintiffs in error, v. Abraham & Julius Sands.* In error to the Supreme Court of the Territory of Montana. Mr. Chief Justice Waite delivered the opinion of the court, reversing the judgment of the said supreme court, with costs, and remanding the cause with directions to reverse the judgment of the district court, and to direct that court to proceed as law and justice may require, and in accordance with the opinion of this court. It is here held that under the Code of Procedure in Montana judgment cannot be entered against the defendant as by default, because his answer only denies the allegations of the bill on information and belief, the court being of the opinion that such an answer was sufficient to present issues for trial.

No. 215. *Richard Gregg et al., plaintiffs in error, v. C. W. Upton, assignee, &c.* In error to the Circuit Court of the United States for the Northern District of Illinois. Mr. Chief Justice Waite announced the decision of the court, affirming the judgment of the said circuit court, with costs and interest. No opinion.

No. 478. *Erasmus D. Foree, plaintiff in error, v. William A. McVeigh.* In error to the Supreme Court of the State of Virginia. Mr. Chief Justice Waite announced the decision of the court, affirming the judgment of the said supreme court, with costs. No opinion.

The Chief Justice announced the following order:—

"On account of the insufficiency of the appropriation by Congress, it is apparent that we shall not be able to continue the hearing of causes at the present term later than the 15th or 20th of May. We shall therefore close the term May 7th, and thus enable the justices to give attention to their business upon the circuit, which could not be done in many of the districts if we continue later. An announcement will be made hereafter of the time when the call of the docket will be stopped."

Monday, April 23, 1877.

No. 211. *The First National Bank of Washington, plaintiff in error, v. A. F. Whitman, Administrator, &c.* In error to the Supreme Court of the District of Columbia. Mr. Justice Hunt delivered the opinion of the court, reversing the judgment of the said supreme court, with costs, and remanding the cause with directions to award a new trial, and for such further proceedings as the parties may be advised to take. In this case it is held that the payer of a check, which has not been accepted by the bank on which it is drawn, cannot maintain an action upon it against the bank. Until acceptance there is no privity of contract between the payer and the bank so held. Where a check of the treasurer of the United States upon a depository bank has been paid upon an unauthorized indorsement of the name of the payee, and where the action was brought by the true owner of the check, it does not alter the rule that there has been a settlement of accounts between the treasurer and the bank. Another check in question was allowed in the account to the credit of the bank upon the supposition that it has been properly paid. Such erroneous allowances do not affect the real state of the accounts, but is open to correction when discovered. Payment to a stranger upon an unauthorized indorsement does not operate as an acceptance of the check so as to authorize an action by the real owner to recover the amount, as upon an accepted check.

No. 958. *Hiram Barney, plaintiff in error, v. The City of Keokuk et al.* In error to the Circuit Court of the United States for the District of Iowa. Mr. Justice Bradley delivered the opinion of the court, affirming the judgment of the said circuit court in this cause, with costs. Mr. Justice Miller, being interested in the result, took no part in the hearing or the decision. This was an affirmance of judgment against Barney in an action in ejectment brought by him against the city and several railroad companies, to recover possession of certain lands occupied by them with tracks, depots, and other

buildings on the bank of the Mississippi River. The question was upon the right to the use of the premises for the purposes stated. The plaintiff alleging that they belonged to him by reason of being frontage between his property and the river, his deeds from the city vesting him with title to the river's edge. The decision is, that the right of the riparian owner extends to high-water mark; but that between that and low-water mark the title is in the city, and that the city had the right to widen and improve to any extent by filling in below high water, and building wharves and levees for public use; and that title to the lands so made remained in the corporation.

No. 140. *The Illinois Central R. R. Co., appellant, v. Samuel H. Turrill*; No. 143. *The Michigan Southern & Northern Indiana R. R. Co., appellant, v. Samuel H. Turrill*. Appeals from the Circuit Court of the United States for the Northern District of Illinois. Mr. Justice Strong delivered the opinion of the court, reversing the decrees of the said circuit court, with costs, and remanding the causes for further proceedings in conformity with the opinion of this court.

No. 141. *The Chicago & Alton R. R. Co., appellant, v. Samuel H. Turrill*; No. 142. *The Chicago Burlington & Quincy R. R. Co., appellant, v. Samuel H. Turrill*; No. 144. *The Pittsburg, Fort Wayne & Chicago R. R. Co., appellant, v. Samuel H. Turrill*. Appeals from the Circuit Court of the United States for the Northern District of Illinois. Mr. Justice Strong delivered the opinion of the court, affirming the decrees of the said circuit court in these causes, with costs and interest. Dissenting, Mr. Justice Field and Mr. Justice Swayne. These were suits for infringement of a patent for an improvement in the common anvil or swage-blocks used in welding up and reforming the ends of railroad rails when they have exfoliated or become shattered from unequal wear. In some of them the infringement is found and the judgments are affirmed, but in the others the judgments are reversed. The following are the orders: in No. 140 the judgment is reversed; in No. 143 the judgment is reversed; in Nos. 141, 142, and 144 the judgments are affirmed.

No. 196. *Amos Gould, plaintiff in error, v. Henry Day*. In error to the Circuit Court of the United States for the Eastern District of Michigan. Mr. Justice Field delivered the opinion of the court, affirming the judgment of the said circuit court, with costs and interest. This was an action against the defendant for selling lands of the plaintiff, whose tax deeds had not been recorded, to other parties in the name of the apparent owner by the record, knowing at the time that they belonged to the plaintiff. The court sustains the ruling below, that the tax deeds were *prima facie* evidence that the title to the lands embraced in them was in the plaintiff, when the defendant, as attorney, attempted to convey them to others, and that, therefore, the plaintiff was not injured by the conveyance made.

No. 209. *Joshua Merrill, appellant, v. D. M. Yeomans et al.* Appeal from the Circuit Court of the United States for the District of Massachusetts. Mr. Justice Miller delivered the opinion of the court, affirming the decree of the said circuit court, with costs. Dissenting, Mr. Justice Clifford. This is the affirmance of a decree below, against the appellant, who sued for an infringement of his patent for an invention used in the preparation of oils; the court holding that as the defendants merely dealt in oils, using neither the complainant's process nor any other in their preparation, they are not liable for an infringement.

No. 213. *John Robertson et al., appellants, v. Eli W. Blake*; No. 219. *Eli W. Blake, appellant, v. John Robertson et al.* Appeals from the Circuit Court of the United States for the Eastern District of New York. Mr. Justice Swayne delivered the opinion of the court, affirming the decree of the said circuit court, the costs to be paid by parties taking appeals. This was an action to recover for the infringement of a patent to Blake for a stone-breaking machine. An infringement having been found, and the damages found to be nominal only, both parties appealed. The decrees are affirmed, the court remarking that as special damage was not proved it could not be awarded.

Monday, April 30, 1877.

No. 229. *The New Jersey Mutual Life Insurance Company, plaintiff in error, v. Anson M. Baker*. In error to the Circuit Court of the United States for the Northern District of New York. Mr. Justice Hunt delivered the opinion of the court, affirming the judgment of the said circuit court, with costs and interest. In this case the company seek to avoid the policy on the ground that certain answers made by the insured at the date of the issue of the policy were false. The court finds no evidence that the policy contained

any agreement that the statements of the applicant should be express warranties, or that they should have any effect whatever, or that the application itself was ever presented to the insurance company, or that the policy was based upon the application. It is further found that the agent of the company undertook to interpret the answers made, and as so interpreted wrote them in the application. In this form it is held to be a statement prepared by the company, for which it alone is responsible, and that it cannot be set up to defeat the policy.

No. 228. *The Connecticut Mutual Life Insurance Company, plaintiff in error, v. Francisca Schaefer.* In error to the Circuit Court of the United States for the Southern District of Ohio. Mr. Justice Bradley delivered the opinion of the court, affirming the judgment of the said circuit court, with costs and interest. In this case the court held that where the husband's life is insured for the benefit of the wife, and they are subsequently divorced, the wife's insurable interest does not so far cease as to render the policy invalid, and that she may recover. In such a case it is said where the parties to the contract have not provided against such a contingency the courts cannot do it for them.

No. 221. *Joseph Selden, Collector, plaintiff in error, v. The Equitable Trust Company.* In error to the Circuit Court of the United States for the District of Connecticut. Mr. Justice Strong delivered the opinion of the court, affirming the judgment of the said circuit court, with costs and interest. In this case the trust company was taxed as a banker, although its only business was the investing of its own capital in mortgage, securities on real estate, and selling such securities with a guaranty. The court say that as the company lent only its own money and sold only its own property, its business cannot be considered to be that of a banker, as defined by the revenue laws.

No. 238. *The Milwaukee & St. Paul Railroad Company, plaintiff in error, v. Timothy Kellogg.* In error to the Circuit Court of the United States for the District of Iowa. Mr. Justice Strong delivered the opinion of the court, affirming the judgment of the said circuit court in this cause, with costs and interest. This was an action to recover compensation for the destruction of a saw-mill by fire, by the negligence of the employees of the company in the management of a ferry steamer. Sparks from the steamer fired the elevator near the mill, from the burning of which the mill took fire. The court hold that the burning of the elevator did not constitute an intervening and independent cause between the negligent conduct of the defendants and the injury to the plaintiffs, as contended by the company, and affirm judgment.

No. 220. *Eli Allore, appellant, v. Marshall Jewell.* Appeal from the Circuit Court of the United States, for the Eastern District of Michigan. Mr. Justice Field delivered the opinion of the court, reversing the decree of the said circuit court, with costs, and remanding the cause with directions to enter a decree in conformity with the opinion of this court. Dissenting, Mr. Justice Strong, Mr. Chief Justice Waite, and Mr. Justice Bradley. This was an action to set aside a conveyance of real estate alleged to have been made by the complainant's mother just before her death, by undue influence, when she was in a weak state of mind and incapable of making a valid contract. The court find the facts as alleged and reverse the decree, holding it to be settled law that whenever there is great weakness of mind, arising from age, sickness, or any other cause, though not amounting to absolute disqualification and gross inadequacy of compensation in the transaction complained of, a court of equity will interpose to protect the injured party.

No. 230. *H. C. Hyde, Assignee, &c., plaintiff in error, v. Frank H. Woods et al.* In error to the Circuit Court of the United States for the District of California. Mr. Justice Miller delivered the opinion of the court, affirming the judgment of the said circuit court in this cause, with costs. In this case the assignee in bankruptcy of one Fenn sought to recover the proceeds of Fenn's seat in the San Francisco Stock Exchange Board, which, under a rule of the board, must first discharge his indebtedness to members of the board, before its proceeds could go to creditors outside. The plea was that by an assignment of the bankrupt the creditors inside the board were preferred. The decision is that the assignment by Fenn was a void act, and gave the creditors within the board only such rights as the regulations of the association entitled them to without it; and that therefore it could not be treated as affecting the rights of any party to the controversy. It is also said that there is no reason why the stock board should not make membership subject to the rule in question, unless it be that it is a violation of some statute, or a principle of public policy, which it is not.

No. 232. *Frederick Davey et al., claimants and appellants, v. Joseph Good.* Appeal from the Circuit Court of the United States for the District of Maryland. Mr. Justice Clifford delivered the opinion of the court, affirming the decree of the said circuit court, with

costs and interest. This was an affirmance of a decree in admiralty, in a case of collision in Chesapeake Bay between a schooner owned by the appellants and a steamer owned and navigated by Good. The court find that the schooner violated the sailing rules prescribed by the act regulating navigation, and that the decree below, dividing the damages, was correct, it having been adjudged that the steamer also erred in not keeping out of the way, under the rule.

No. 625. *James W. McCready, plaintiff in error, v. The Commonwealth of Virginia*; No. 992. *James W. McCready, plaintiff in error, v. The Commonwealth of Virginia*. In error to the Supreme Court of Appeals of the State of Virginia. Mr. Chief Justice Waite delivered the opinion of the court, affirming the judgments of the said supreme court of Virginia, with costs. In these cases it is decided that the State of Virginia can prohibit the citizens of other states from planting oysters in the beds of tide-waters within her jurisdiction, while permitting her own people to do so. For the purpose of the ownership of the tide-waters and their beds, it is said, the state represents the people, and the ownership is that of the people in their united sovereignty. The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and inter-state commerce, has been granted to the United States. There has, however, been no such grant of power over the fisheries. These remain under the exclusive control of the state, which has consequently the right in its discretion to appropriate its tide-waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is in effect nothing more than a regulation of the use of the people of their common property. This right of the people of the state comes not from their citizenship alone, but from their citizenship and property combined. It is in fact a property right, and not a mere privilege or immunity of citizenship.

DIGEST OF CASES

PUBLISHED IN EXTENSO IN LATE ISSUES OF AMERICAN LEGAL PERIODICALS.

ABBREVIATIONS.

Albany L. J. — *Albany Law Journal*, Albany, N. Y., WREED, PARSONS & CO.
 Am. Law Rec. — *American Law Record*, Cincinnati, O., H. M. MOOS.
 Am. Law Reg. — *American Law Register*, Philadelphia, Pa., D. B. CANFIELD & CO.
 Cent. L. J. — *Central Law Journal*, St. Louis, Mo., SEYMOUR D. THOMPSON.
 Chicago L. N. — *Chicago Legal News*, Chicago, Ill., CHICAGO LEGAL NEWS CO.
 Ins. L. J. — *Insurance Law Journal*, New York, C. C. HINE, 176 Broadway.
 Int. Rev. Rec. — *Internal Revenue Record*, New York, W. P. & F. C. CHURCH.
 La. L. J. — *Louisiana Law Journal*, New Orleans, La.
 Leg. Chron. — *Legal Chronicle*, Pottsville, Pa., SOL. FOSTER, JR.
 Leg. Int. — *Legal Intelligencer*, Philadelphia, Pa., J. M. POWER WALLACE.
 Mo. West. Jur. — *Monthly Western Jurist*, Bloomington, Ill., T. F. TIPTON.
 N. B. R. — *National Bankruptcy Register*, New York, CAMPBELL & CO.
 Pac. Law Rep. — *Pacific Law Reporter*, San Francisco, Cal., J. P. BOGARDUS.
 Pittsb. L. J. — *Pittsburg Legal Journal*, Pittsburg, Pa., J. W. & J. S. MURRAY.
 W. L. R. — *Washington Law Reporter*, Washington, D. C., JNO. L. GINCK.
 W. N. C. — *Weekly Notes of Cases*, Philadelphia, KAY & BRO.
 West. Jur. — *Western Jurist*, Des Moines, Iowa, MILLS & CO.

BANKRUPTCY.

1. PRIORITY. — WHERE AN ASSIGNMENT FOR THE BENEFIT OF CREDITORS IS SET ASIDE at the suit of the assignee in bankruptcy, judgment

creditors, who have levied upon the property after the assignment and before the commencement of the proceedings in bankruptcy, have no priority over the assignee. *In re Biesenthal*, C. C. U. S. S. D. N. Y.; 15 N. B. R. Nos. 5 and 6.

2. TITLE OF ASSIGNEE WHERE VOID TRANSFERS HAVE BEEN MADE. — While, in general, the title of the assignee relates back only to the commencement of the proceedings in bankruptcy, yet where transfers have been made which are void as to him, his title relates back to the time of such transfer. *Ib.*

3. FUND IN RECEIVER'S HANDS. — WHERE, IN AN ACTION TO FORECLOSE A MORTGAGE, proceedings for the appointment of a receiver of the rents and profits are instituted before the adjudication of the mortgagor as a bankrupt, and there is a deficiency on the sale of the mortgaged premises, the assignee cannot claim the fund in the receiver's hands as against the mortgagee. *Hayes v. Dickinson*, S. C. N. Y., *Ib.*, Nos. 8 and 9.

4. ATTACHMENT. — THE COMMENCEMENT OF PROCEEDINGS in bankruptcy does not of itself dissolve an attachment granted within the time prohibited by law; the adjudication alone has that effect, and the deed of assignment relates back and vests the title to the property in the assignee as of the date of filing the petition. There is, therefore, no time at which the lien of a judgment can attach to such property. *In re Badenheim*, D. C. U. S. S. D. Miss., *Ib.*

5. BILL OF SALE. — WHERE ONE WHO AFTERWARDS BECOMES BANKRUPT obtains a loan from another and executes a bill of sale of certain property to him, but retains possession of the property under a writing in the nature of a lease with rent reserved, and which contained a provision for a repurchase of the property for a specified sum, neither bill of sale nor lease being recorded, the transaction is in the nature of a mortgage, and void as to the creditors of the bankrupt. *In re Gurney*, C. C. U. S. E. D. Wisc., *Ib.*

6. AN ASSIGNEE HAS A STRONGER RIGHT THAN THE BANKRUPT. He stands in the place of an attaching or execution creditor and may impeach the validity of such mortgage. *Ib.*

7. JURISDICTION. — A STATE COURT IS NOT OUSTED of its jurisdiction in attachment cases by proceedings in bankruptcy, unless such proceedings are pleaded. *Haber v. Klauberg*, Ct. App. St. Louis, *Ib.*

8. PLEDGES OF THE BANKRUPT REDEEMED BY THE ASSIGNEE are assets in his hands, and cannot be considered to have been redeemed for the benefit of a single creditor to the prejudice of the general creditors whose funds have thus been diverted. Where the assignee redeems valuable pledges, he is subrogated to the rights of the pledgee until the fund is made good from the proceeds of the redeemed pledges. *McLean v. Cadwalader*, Ct. Com. Pl. Phila., *Ib.*

9. SAVINGS BANK. — THE LAW OF NEW HAMPSHIRE, which provides that when the assets of a savings bank shall fall below ninety per cent. of the amount of deposits, the deposit account shall be reduced so as to divide the loss equitably among the depositors, is not void because the general United States Bankrupt Law was in force when it was enacted. Under such circumstances the condition of the bank is such as to place it among the class of cases excepted from the operation of the bankrupt law. *Simpson v. The City Savings Bank*, S. C. N. H., *Ib.*

10. JUDGEMENT LIEN. — WHERE A JUDGMENT CREDITOR OF THE BANKRUPT PROVES HIS DEBT, he will be considered as having waived his lien created by that judgment on other property of the bankrupt. *Heard v. Jones*, S. C. Ga., *Ib.*

11. INJUNCTION. — WHEN EXECUTION CREDITORS OF A BANKRUPT PETITION the bankrupt court to modify an injunction so as to allow the sheriff to sell the property, and an order is thereupon entered directing the sheriff to sell and to pay the proceeds into court, the execution creditor is bound by the order, and cannot maintain an action against the sheriff for paying the money into court in pursuance of such order instead of paying it to them. *O'Brien v. Weld*, S. C. U. S., *Ib.*

12. PLEADING, ETC. — UNDER SECTION 13 OF THE REVISED STATUTES of the United States, in a suit brought by an assignee in bankruptcy, after the passage of the Act of June 22, 1874, amending the bankrupt act, to recover back money paid before June 22, 1874, in violation of section 5128 of the Revised Statutes, it is sufficient for the declaration to lay the payment as made within *four* months of the bankruptcy, instead of *two* months; and to charge that the defendant had *reasonable cause for believing* that the payment was made in fraud of the provisions of the bankrupt law, and need not charge that the defendant *knew* that it was so made. *Warren v. Garber*, C. C. U. S. E. D. Va., *Ib.*

13. EVIDENCE. — UNDER THE GENERAL MONEY COUNTS IN SUCH A DECLARATION, evidence will not be admitted to prove any liability or implied promise, contract, or obligation arising exclusively under section 5128 of the Revised Statutes, in a trial before a jury. *Ib.*

14. A DISCHARGE IN BANKRUPTCY, GRANTED TO ONE MEMBER OF A PARTNERSHIP, AFTER HE ALONE HAD BEEN ADJUDGED BANKRUPT in a proceeding affecting him alone, to which his copartner was not a party, is not a bar to an action against him and his copartner by a partnership creditor, where the creditor shows affirmatively that, at the time of the filing of the petition, there were partnership assets as well as partnership debts. *Crompton v. Conkling*, D. C. U. S. S. D. N. Y., *Ib.*

15. PROOF OF DEBT. — WHERE THE WARDEN OF A STATE PRISON RECEIVES MONEYS FROM THE STATE and deposits them in his name as such warden in a bank, which subsequently becomes bankrupt, the state is not entitled to a preference over the other creditors to such money. The warden may prove his account as a general creditor. *In re Corn Exchange Bank*, C. C. U. S. E. D. Wisc., *Ib.*

16. PRACTICE IN INVOLUNTARY CASES. — PETITION BY CORPORATION. — VERIFICATION. — AFFIDAVITS, ETC. — A charge in the alternative in an involuntary petition, that the debtor is insolvent or in contemplation of bankruptcy at the time of the alleged fraudulent preference, is not sufficient. A petition filed by a corporation may be verified by an agent, who need not be an officer of such corporation; but the authority of such agent to act for the corporation must be set forth in the affidavit, or otherwise established; it is not sufficient that it be stated by way of recital following deponent's name. Where the affidavits to the petition or the depositions as to indebtedness and acts of bankruptcy are insufficient, the court has power to allow supplemental affidavits or proofs to be filed. *In re Hanibel*, D. C. U. S. Col., *Ib.* No. 5.

17. A DEBT DUE FROM A FACTOR for the proceeds of goods sold is barred by his discharge in bankruptcy. *Woolsey v. Cade*, S. C. Ala., Ib.

18. A CREDITOR CANNOT COMPEL PARTNERS, WILLING OR UNWILLING, TO PETITION for the adjudication of other persons who are alleged to be their fellow partners. Nor can any man lawfully be called upon to show cause why he shall not go himself, or put anybody else into voluntary bankruptcy. *In re Harbaugh*, D. C. U. S. W. D. Pa., Ib.

19. THE FEES OF REGISTERS ARE GOVERNED BY GENERAL ORDER No. 30, promulgated April 12, 1875, although the services were rendered before its adoption. *In re Carstens*, D. C. U. S. S. D. N. Y., Ib.

20. IN INVOLUNTARY PROCEEDINGS AGAINST A SEPARATE PARTNER, creditors of the partnership must be counted in computing the legal quorum of petitioning creditors. One fourth of the creditors whose provable debts severally are over two hundred and fifty dollars, and in the aggregate are equal in amount to one third of all the provable debts, are sufficient; or in default of enough of this class signing the petition, one fourth in number of all the creditors whose debts, without regard to their several amounts, equal in the aggregate one third of all the provable debts, must be joined. The claim of a creditor on a bond, the sureties on which have been indemnified by mortgage, is not a secured claim and should be counted. The register should return lists of the claims counted and rejected with his report. *In re Lloyd*, D. C. U. S. W. D. Pa., Ib.

BILLS AND NOTES.

See PARTNERSHIP, 1, 3.

COMMON CARRIER.

LIABILITY FOR INJURY SUSTAINED BY ONE PASSENGER AT THE HANDS OF A FELLOW PASSENGER. — DAMAGES. — In this case, four or five persons in the employ of the railroad company, but no temployees on that train, were co-passengers with the plaintiff on a special train, improvised to meet the demands of travel to and from the state fair: They and the plaintiff were riding in the baggage car, and they rudely deprived the plaintiff of his hat; the plaintiff went in search of the conductor to get redress, and informed him of the injury; the conductor went with the plaintiff to the baggage box and asked for the hat to be returned to the plaintiff; very insulting language was *immediately* used by one of these parties towards the plaintiff, and *immediately* a fight ensued, in which the plaintiff was shot, and the plaintiff, retreating from the car, knocked two of his assailants senseless with a hatchet. The conductor retreated in advance of the plaintiff, so that, when the plaintiff reached the platform of the car, he found the conductor there. Immediately the conductor rushed the plaintiff through a car-window and through several passenger cars, to get him beyond the reach of the assailants. Some of the assailants followed into the car next to the baggage car, and in that car, after the plaintiff and conductor had left it, and not in the hearing of the plaintiff, heaped abusive epithets on him. The conductor did nothing more to quiet the assailants, or to eject them from the car, but left them in the baggage car where the plaintiff's luggage was, and in the

car next to it, to the end of the journey, which was less than twenty miles. The plaintiff was slightly injured, being able to go about the next day, but was prevented from attending to his business for more than ten days. The jury found a verdict of \$6,000 damages. The company did not discharge any of these employees from its service, but promoted one of them. *Held*, that the conduct of the conductor, up to the time of his retreat from the fight to the platform of the car, was such as to render the company liable for compensatory damages; and that his allowing the assailants to continue in the baggage car, where the plaintiff's luggage was, and a part of them to go into a passenger car, and there use abusive language towards the plaintiff, without making any effort to stop it, or to eject these parties from the train, coupled with the fact that the company had not discharged any of the assailants, but had promoted one of them, made a case where exemplary damages were allowable. *N. O., St. L. & C. R. R. Co. v. Burke*, S. C. Miss., Cent. L. J., June 8, 1877.

CRIMINAL LAW.

1. SELECTION OF JURORS FIVE DAYS BEFORE HEARING. — The selection of jurors in a homicide case was completed on the last day of the term, the jury were then sworn, and the case adjourned from day to day until five days thereafter, when the hearing actually commenced. *Held*, that, the jury having been sworn during the term, the case could be continued after the term; and that the adjournment was a matter within the sound discretion of the court below, which in this case did not appear to have been abused. *Carroll v. Commonwealth*, S. C. Pa., W. N. C., June 14, 1877.

2. MOTIVE. — EVIDENCE, ETC. — UPON A TRIAL FOR MURDER it appeared that, although the crime was instigated by one who wished to avenge a private injury, yet it was actually executed by the prisoners, who were strangers to the murdered man, and had no cause of enmity against him. To explain the motive for the crime, the commonwealth offered to prove the existence of a secret and criminal organization which furnished men from one division to commit murder, and in return obtained men from the division to which the instigator of the crime belonged to murder a man obnoxious to the first division. *Held*, that this evidence was properly admitted. *Ib.*

3. EVIDENCE OF ACCOMPLICE. — An accomplice, besides proving the murder, testified to a number of subsequent occurrences, which, although not directly connecting the prisoners with the commission of the crime, yet tended to explain the relations, conduct, and motives of the prisoners. The commonwealth then called other witnesses to prove these occurrences. *Held*, that this evidence was not simply corroboration of an accomplice upon immaterial points, but was to a large extent independent and confirmatory, and in view of the other evidence in the cause was properly admitted. *Ib.*

DAMAGES.

See COMMON CARRIER; INJUNCTION.

EVIDENCE.

* See CRIMINAL LAW, 2, 3.

INJUNCTION.

A COURT OF EQUITY WILL ONLY INTERFERE IN A CASE OF TRESPASS to prevent irreparable mischief, or a multiplicity of suits, and not when the trespass is temporary and adequate compensation in damages can be obtained in an action at law. S. filed a bill praying for an injunction to restrain M., the owner of an adjacent lot, from removing the boundary fence between the properties to the distance of two feet upon his (S.'s) land. M. set up title to the two feet of land, and the master to whom the case was referred reported that such title was proved by the evidence. The court below, nevertheless, enjoined M. from removing the fence until the determination of an action of ejectment which, after the filing of the bill, had been instituted by M. against S. for the strip of land in dispute. *Held*, that the facts did not give the court jurisdiction to grant an injunction. *Minnig's Appeal*, S. C. Pa., W. N. C., June 7, 1877.

INSURANCE.

1. CONSTRUCTION OF POLICY. — "CONTIGUOUS" DEFINED. — The policy provided that "the generating or evaporating within the building, or contiguous thereto, of any substance for a burning gas, or the use of gasoline for lighting, is prohibited, unless by special agreement indorsed on this policy." *Held*, that gasoline works fifty feet distant for lighting the building, were not "contiguous" within the meaning of the policy, and that the use of gas so generated from gasoline is not "the use of gasoline" within the meaning of the policy. *Arkell v. Commerce Ins. Co.*, Ct. App. N. Y., Ins. L. J., April, 1877.

2. INSURANCE OBTAINED THROUGH BROKER. — MISREPRESENTATION, ETC. — The policy provided that the application should be deemed a part of the policy, and a warranty; "and if any person insuring any building or goods in this office shall make any misrepresentation or concealment, such insurance shall be void." Also, "in all cases of application for insurance in this company, the applicant shall state the true value of the property, and also the amount of incumbrance, if any exist thereon." The insurance was effected through a broker. No written application was made or required. He merely presented the written forms adopted in policies in his own companies on the same property, and stated to the defendant's agent that he approved the risk. The existence of mortgages on the property was not stated in the written forms, nor mentioned to the agent. *Held*, that the presentation of the written statement in the policies by the broker was an application by the insured; that the failure to disclose the existence of the incumbrances rendered the policy void, regardless of the materiality; and that there was no ground in the construction of the policy, or in the facts, for applying the doctrine of estoppel. *Beck v. Hibernia Ins. Co.*, Ct. App. Md., *Id.*

3. CONSTRUCTION OF POLICY. — IMPERFECT ANSWER IN APPLICATION. — The application contained the following questions: Whether the party had had any sickness or disease during the last ten years, and if so, "state the particulars and the name of the physician or physicians who prescribed or were consulted." Answer, "Nine years ago, had an attack

of typhoid fever." Also, "Have you employed any physicians for yourself or your family? if so, give name or names, and residence." Answer, "Dr. Paine, Putnam, Ct., nine years ago, now dead." The answers were warranted to be full, correct, and true. *Held*, that there was no warranty that the answers stated the names of all the physicians employed or consulted at any time. The meaning was that the answers were true and full, in the sense that the insured had not intentionally concealed any material fact. *Dilleber v. Home Life Ins. Co.*, Ct. App. N. Y., *Ib.*

4. PURCHASE OF POLICY. — A PERSON WHO HAS NO INTEREST in another's life cannot purchase or take by assignment an insurance policy on such life. Such a thing would be clearly against public policy, and is not authorized by law. *Mo. Valley Life Ins. Co. v. Sturgis*, S. C. Kans., *Ins. L. J.*, May, 1877.

5. CONSTRUCTION OF POLICY. — WRITTEN AND PRINTED CONDITIONS. — An insurance policy provided *in writing* for insuring Bernstein's "stock of boots and shoes, dry goods, drugs, liquors, and such other goods as are usually kept for sale in a country store;" and provided *in printing* that "gunpowder, saltpetre, phosphorus, petroleum, naphtha, benzine, benzole, or benzine varnish are positively prohibited from being deposited, stored, or kept in any building insured, or containing property insured by this policy, unless by special consent *in writing* indorsed on this policy, *naming each article specially*, otherwise the insurance shall be void;" and accompanying the policy, and a part of it, is the application of the assured, in the body of which he obtains *in writing* special permission to keep one of the prohibited articles, in the following words, to wit: "Permission given to keep coal oil, not to exceed three barrels at any one time." *Held*, that the true construction of the policy was as follows: The insurance company insures Bernstein's "stock of boots and shoes, dry goods, drugs, liquors, and such other goods [including 'gunpowder, saltpetre, phosphorus, petroleum, naphtha, benzine, benzole, or benzine varnish'], as [the same] are usually kept for sale in a country store;" provided, however, that as to "gunpowder, saltpetre, phosphorus, petroleum, naphtha, benzine, benzole or benzine varnish" [said insurance does not extend, except by the "special consent" of the company "in writing, indorsed on this policy, *naming each article specially*," and said articles] "are positively prohibited from being deposited, stored, or kept in any building insured or containing any property insured by this policy, unless by special consent [of the company] in writing, indorsed on this policy, *naming each article specially*;" and that the assured could not keep gunpowder in any shape or quantity in his store along with his other goods without the consent of the insurance company in writing, *naming such article specially*, without violating the terms of his policy. *Cobb v. Ins. Co. of No. Am.*, *Ib.*

6. PAROL TESTIMONY TO ENLARGE POLICY. — Where the policy was by its terms avoided on account of insurance effected in excess of the amount permitted, parol evidence is admissible to show that the corporation had knowledge of the additional insurance, and agreed that permission should be granted in the policy, but failed to do so. *Greene v. Eq. Fire & Mar. Ins. Co.*, S. C. R. I., *Ib.*

7. PAYMENT OF PREMIUM. — ANNUAL CREDITS. — PAID-UP POLICY.

— FORFEITURE, ETC. — A credit of one third of the premium each year was allowed to the insured, he executing a paper acknowledging a receipt of credit for the amount to be deducted from the policy when it becomes a claim if not previously cancelled; "and in case said policy is surrendered, this acknowledgment will be taken in settlement of the equitable value thereof." The policy stipulated that after the receipt of not less than three annual premiums, the company would issue a paid-up policy, "subject to any loans or credits outstanding against the policy for such an amount as the surrender value of the premiums received hereon would purchase as a single premium." The receipt of the first premium was acknowledged in the policy, and the subsequent payments indorsed as "received — dollars in cash and notes, which amounts, if said notes are duly paid on or before maturity thereof, will complete the payment of the premium," needed to keep the policy in force to the end of the year, and in case the notes shall not be paid on or before maturity, the policy shall at once become void without notice. The policy provided that it should be avoided by the "failure to pay any annual premium when due, or any note, obligation, or indebtedness," other than the annual credit or loan, for premiums or interest; that a failure to pay the annual credit at the end of the year did not forfeit the policy; that the payment of the cash, and giving the note each year, was a full payment of the premium; and that the insured was entitled to a paid-up policy without first paying the amount of the loans, after three annual payments. *Kirkpatrick v. Knickerbocker Life Ins. Co.*, S. C. Tenn., Ib.

NEGLIGENCE.

1. PRESUMPTIONS. — ALTHOUGH THE BURDEN OF PROOF FALLS UPON A PLAINTIFF to establish the negligence of a railroad company sued for an injury caused by their cars running off the track; still, where the plaintiff is guilty of no negligence, and the cause of the accident is not disclosed by the attending circumstances, the burden of explanation falls upon the company to show that there was no fault upon their part; and a jury would be authorized to presume them guilty of negligence if they fail to do so. *Stevens v. E. & N. A. Railway*, S. C. Me., Am. Law. Reg., May, 1877.

2. RAILROAD. — INJURY TO SERVANT. — A statute of Missouri giving a right of action against a railroad company, "whenever any person shall die from an injury resulting from or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant, or employee, whilst running, conducting, or managing any locomotive, car, or train of cars" (1 Wag. Stat. p. 517, § 1), does not give a right of action in case of death happening through the negligence of a fellow-servant, the master not having been at fault in selecting or retaining in his employment an unskilful, negligent, or otherwise improper servant. It was not the intention of the above statute to alter the common law rule as to the liability of a master for an injury happening to one servant through the negligence of a fellow-servant engaged in the same employment, nor to give an action for an injury resulting in death, where there would have been no cause of action had death not resulted. *Schultz v. Pacific Railroad*, 36 Mo. 13, over-

ruled. *Proctor v. H. & St. J. R. R. Co.*, S. C. Mo., Cent. L. J., March 30, 1877.

3. A CARRIAGE WHILE BEING DRIVEN ACROSS THE TRACK OF A PASSENGER RAILWAY was struck by the pole of a car and injured. In an action against the passenger railway company for damages: *Held*, that the questions of the alleged negligence of the respective drivers of the carriage and car were questions of fact to be submitted to the jury. *Girard, &c., Pass. R. W. Co. v. Middleton*, S. C. Pa., W. N. C., April 5, 1877.

See COMMON CARRIER.

PARTNERSHIP.

1. NOTE GIVEN IN FIRM NAME AFTER DISSOLUTION. — After the dissolution of a partnership, even if it be conceded that the liquidating partner has authority to give an acknowledgment of debt in the firm name, yet he has no authority, by implication of law, to give a note in the firm name, which increases the amount of the indebtedness, or extends the time of liability, or in any way amounts to a new contract. *Smith v. Sheldon*, S. C. Mich., Am. Law Reg., May, 1877.

2. AFTER THE DISSOLUTION OF A PARTNERSHIP, IF ONE PARTNER BUYS OUT THE INTEREST OF THE OTHERS, and agrees to assume the debts, he becomes, as between the parties, the principal debtor, and the retiring partners merely sureties; and creditors of the firm having knowledge of this equity are bound to regard it in their subsequent dealings with the parties. *Ib.*

3. ACCEPTANCE OF NOTE IN FIRM NAME AFTER DISSOLUTION. — Where, after the dissolution of a firm under such circumstances, a creditor accepted from the liquidating partner, without the knowledge of the others, a note in the firm name, with interest at a special rate, the retiring partners were thereby discharged from the original debt. This result was not varied by the fact that the note was at very short time, one day, where the agreement for a high rate of interest showed an intention to give indulgence beyond the time named, and such indulgence was, in fact, given until the principal debtor became insolvent. These facts, while legally immaterial, have a strong bearing on the equities, by showing that the creditor bargained for an advantage that the sureties were not to share, and therefore they could not be compelled to share the risk. *Ib.*

4. WHERE PARTNER IS MEMBER OF TWO FIRMS DEALING WITH EACH OTHER. — A., the partner of B., having charge of the firm's business at a particular place, employed a firm of which he was a member to conduct it for a commission; the accounts rendered to B. showed that this was the course of dealing, and no objection was made, and the effect was to reduce the expense of transacting the business: *Held*, that B. could not, after dissolution and settlement, demand an account of A.'s share of such commissions.

A. sold coal of his firm to another firm of which he was a member, with notice to his partner, and at the full market value: *Held*, that he was not liable to account for profits received by him as partner in the purchasing firm, although said firm took the coal to fill contracts for delivery at a larger price than they paid for it. *Freck's Appeal*, S. C. Pa., W. N. C., March 29, 1877.

5. PROFITS WHERE BUSINESS IS CARRIED ON AFTER DISSOLUTION OF FIRM. — RIGHTS OF FORMER PARTNERS. — If after the termination of any partnership by death, dissolution, bankruptcy, or otherwise, the business is continued by a portion of the associates, with the capital or appliances of the firm, all profits derived from such continued business are part of the joint estate, and as such are to be accounted for to all the partners or to their representatives. No partner can make use of that which continues to be partnership property for his own use. All partners are entitled to share in the profits and advantages which result from their use, unless, indeed, those general principles are changed or modified by the agreement of the parties; if they are, such agreement becomes the law which applies to the specialties of a case affected by it. The plaintiff was a member of a firm, and on its dissolution, he retired, and the new firm agreeing to pay the debts of the old firm, and to pay the plaintiff a certain amount, all the assets of the old firm coming to the new firm — the assets afterwards proved almost valueless — and from other circumstances in this case, and from the agreement made at the time of the dissolution, the retiring partner held not to be entitled to recover. *Fithian v. Jones*, S. C. Pa., Leg. Int., May 25, 1877.

PLEADING AND PRACTICE.

NEWLY-DISCOVERED EVIDENCE. — IN EQUITY PRACTICE, WHERE THE EVIDENCE HAS BEEN CLOSED, it will not ordinarily be opened for newly-discovered testimony merely cumulative, but this rule is not imperative; it will be enforced subject to the discretion of the court. Where the newly-discovered testimony is cumulative in character, but makes plain and certain what was doubtful before, so that the court can see that it may be material to a just decision of the cause and there has been no laches in the party offering it, it will be admitted. *Mulock v. Mulock*, Ct. Ch. N. J., Am. Law Reg., May, 1877.

PRIVILEGED COMMUNICATION.

THE NEW YORK STATUTE WHICH PROHIBITS A PHYSICIAN FROM DISCLOSING ANY INFORMATION received by him which is necessary to enable him to prescribe for a patient under his charge, must be liberally construed as a remedial statute, and excludes the evidence of medical attendants, not only as to information obtained from the lips of the patient, but as to information acquired from the patient, from the statements of others who may surround him at the time, or from observation as to his appearance and symptoms. The right of objecting to such evidence is not restricted to the patient insured, or his personal representatives, but may be availed of by his assignee. The protection of the law does not cease upon the death of the party. It can only be removed by the party himself or his legal representatives. The privilege is not abrogated by that section of the Code, by virtue of which a party to an action may examine the adverse party as a witness, in the same manner as other witnesses may be examined. *Edington v. Mut. Life Ins. Co.*, Ct. App. N. Y., Ins. L. J., February, 1877.

PUBLIC POLICY.

See PARTNERSHIP, 2.

RAILROAD.

See COMMON CARRIER; NEGLIGENCE.

RATIFICATION.

PRINCIPAL AND AGENT. — GOOD FAITH OF AGENT. — BANK. — LOAN. — NEGLIGENCE. — Ratification by a principal of his agent's acts is only binding when made on full knowledge of the facts as they actually exist, not merely as the agent supposes them to exist. The good faith of the agent does not exonerate him from liability to his principal if he has been in fact negligent or has disregarded orders. Plaintiff, a bank, authorized its agent to make a loan on a note with any good collateral security. The agent made a loan on what would have been good security had it been free from prior liens, but the existence of prior liens was claimed. The plaintiff, with knowledge of this claim, accepted the note and the collaterals and brought suit to enforce its demand against the holder of the collaterals. In this suit it was defeated, the priority of the holder's lien being established. The plaintiff then brought suit against its agent for negligence in making the loan without good security. *Held*, that it had not ratified the agent's act, and on proof of the negligence it was entitled to recover. Where an agent to loan money takes insufficient security, the principal is not bound at his peril to accept it and discharge the agent or to reject it and look only to the responsibility of the agent; he may take the security and still hold the agent for any deficiency which, after due diligence, he suffers on it. *Owensboro Savings Bank v. Western Bank*, Ct. Ap. Ky., Am. Law Reg., June, 1877.

VENDOR AND VENDEE.

SALE BY SAMPLE. — WARRANTY. — CUSTOM OF TRADE. — In the absence of fraud or representation as to quality, a sale by sample is not in itself a warranty of the quality of the goods, but simply a guaranty that the goods shall be similar in kind and be merchantable. A broker effected a sale for A. of 850 cases of "King's brand" of canned corn to B., who had first been furnished with three of the cans for trial, and found them in perfect condition. No express warranty of the corn to be delivered was made, nor was fraud shown. Part of the lot proving bad, B. refused to accept the balance. In a suit by A. for the purchase money of the whole: *Held*, that there was no warranty as to the quality, and that the plaintiff was therefore entitled to recover. *Boyd v. Wilson*, S. C. Pa., W. N. C., April 19, 1877.

WILL.

1. POWER COUPLED WITH INTEREST, ETC. — Where one who took lands under a will, by the terms of which she had both a life estate in the lands and power to convey the same in fee, executed a deed, which on its face purports to convey in fee simple absolute, for a valuable considera-

tion, if the will be referred to in the deed, the deed shall be held to be an execution of the power and the whole estate shall pass, although no direct reference to the power is made in the deed. And, although the words "executrix of the estate of John, P. C.," in the deed, and the word "executrix" following the signature of the grantee, are mere *descriptio personæ*, mere surplusage, yet these words are operative to show that there was a will of which she was executrix, and such reference to the will, although indirect, is sufficient. *Owens v. Baker*, S. C. Mo., Cent. L. J., April 20, 1877.

2. WHAT CONSTITUTES A WILL. — The following written instrument held to be a will, to wit: —

"Know all men by these presents, that I, James McCully, of Pittsburgh, Pa., do hereby order and direct my administrators or executors, in case of my death, to pay Robert D. Clark the sum of seventy-five thousand dollars, as a token of my regard for him, and to commemorate the long friendship existing between us. Witness my hand and seal, this 17th day of April, A. D. 1872.

"\$75,000.00

JAMES McCULLY. [L. S.]"

Frew v. Clark, S. C. Pa., W. N. C., April 12, 1877.

3. UNDUE INFLUENCE. — FIDUCIARY RELATION. — INTemperance. — SENSUALITY. — Undue influence operating on the mind of an elderly woman, weakened by intemperance, inflamed by abnormal sensual desire, and subjected to the persuasions of one, the object of the inflamed longings, whose relations of confidence gave him ample opportunity of accomplishing his private ends, is an imprisonment of the mind not less cogent than actual duress, and is sufficient to avoid a will made under such influence. *Dushane's App.*, S. C. Pa., W. N. C., May 31, 1877.

NOTES OF NEW BOOKS.

Messrs. KAY & BRO. have the following works nearly ready: —

Morris on the Law of Replevin. Third edition.

Bispham on the Law of Notice.

Williams on Executors and Administrators. By EDWARD VAUGHAN WILLIAMS. Sixth American edition. By J. C. PERKINS, LL.D. 3 vols.

Theobald on the Construction of Wills. A Concise Treatise on the Construction of Wills. By H. S. THEOBALD, Esq.

Reed's Leading Cases in the Law of the Statute of Frauds.

Messrs. COCKCROFT & Co. have published a new work on *Chattel Mortgages*. by H. M. HERMAN, Esq.

A new American edition of *Russell on Crimes*, being the ninth American, from the fourth London edition, with the Notes and References contained in the former editions, and additional Notes to English and American Decisions. By HON. GEO. SHEARWOOD, LL. D., is offered by Messrs. JOHNSON & Co., of Philadelphia.

Messrs. ROBERT CLARKE & Co. have published a new catalogue which they describe as a *Digest of Law Publications*. It is a marked advance, perhaps to be much preferred to any catalogue of its class.

THE AMERICAN LAW TIMES.

NEW SERIES. — AUGUST, 1877. — VOL. IV., No. 8.

NOTES OF OPINIONS, DECISIONS, AND ORDERS

OF THE

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1876.

Monday, May 7, 1877.

No. 247. *The Southern Express Company, plaintiff in error, v. Jno. F. Dickson.* In error to the Circuit Court of the United States for the Southern District of Alabama. Mr. Justice Hunt delivered the opinion of the court, affirming the judgment of the said circuit court, with costs and interest. In this case the agent of the plaintiff Dickson delivered to the express company, at Greensboro, North Carolina, fifty-two boxes of tobacco, to be shipped to Columbia, South Carolina. The boxes were consigned to Trent at that place, and the delivery to the company for shipment was made by Trent, one of the said firm, who at the time informed the company that the tobacco was the property of the plaintiff. A written receipt was given by the company in the usual form. The boxes never left Greensboro, but were sold by Trent to one Mendenhall, without authority of the owner, and by the order of Trent were delivered to him by the company at Greensboro. *Held*, that the company was liable.

No. 248. *N. P. Wilson, appellant, v. Alfred Hoss, appellee.* Appeal from the Supreme Court of the District of Columbia. Mr. Justice Hunt delivered the opinion of the court, affirming the decree of the said supreme court, with costs. The decree in this case was made upon the bill and answer. The opinion is a *pro forma* affirmance. No points of interest were involved.

No. 588. *The Town of East Lincoln, plaintiff in error, v. Charles Davenport.* In error to Circuit Court of the United States for the Southern District of Illinois. Mr. Justice Hunt delivered the opinion of the court, affirming the judgment of the said circuit court, with costs and interest. This cause was decided upon the authority of *Nugent v. Supervisors* (19 Wall. 241), already cited, which holds that a subscriber to the stock of a corporation is released from his subscription by a subsequent alteration of the organization and purposes of the company only when the alteration is a fundamental one, and when in addition such alteration is not contemplated either by the charter of the company or the general statutes of the state.

No. 234. *The Aetna Life Insurance Company, plaintiff in error, v. David France & wife.* In error to Circuit Court United States for Eastern District of Pennsylvania. Mr. Justice Bradley delivered the opinion of the court, affirming the judgment of said circuit court, with costs and interest. Two points are decided in this case: (1.) That a sister has an insurable interest in the life of a brother. The court say: "As held by us in the case of the *Connecticut Mutual v. Schaefer*, just decided, any person has a right to procure an insurance on his own life and to assign it to another, provided it be not done by way of cover for a wager policy; and where the relationship between the parties, as in this case, is such as to constitute a good and valid consideration in law for any gift or grant, the transaction is entirely free from such imputation." (2.) That to avoid the policy the answers in the application must be untrue in material respects and unqualifiedly false.

No. 212. *H. S. Johnson, appellant, v. C. W. Harmon.* Appeal from the Supreme Court of
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the District of Columbia. Mr. Justice Bradley delivered the opinion of the court, affirming the decree of said supreme court in this cause, with costs. Dissenting, Mr. Justice Clifford. It is decided in this cause that a bill of exceptions cannot be taken on the trial of a feigned issue directed by a court of equity.

No. 256. *The Relief Fire Insurance Company, plaintiff in error, v. Elijah A. Shaw.* In error to Circuit Court United States for the District of Massachusetts. Mr. Justice Bradley delivered the opinion of the court, affirming the judgment of said circuit court, with costs and interest. It is ruled in this case that there is nothing in the statutes of Massachusetts to prevent parol contract of insurance.

No. 260. *J. B. Eames & E. A. Cooley, appellants, v. Home Insurance Company.* Appeal from the Circuit Court United States Southern District of Illinois. Mr. Justice Bradley delivered the opinion of the court, reversing the decree of said circuit court, with costs, and remanding the cause with directions to enter a decree in conformity with the opinion of this court. This cause had relation to a question whether or not a contract had been made by certain letters and otherwise, and other questions chiefly of fact.

No. 261. *The Connecticut Mutual Life Insurance Company, plaintiff in error, v. Adam Schwenk, Guardian, &c.* In error to the Circuit Court United States for the Eastern District of Pennsylvania. Mr. Justice Strong delivered the opinion of the court, affirming the judgment of said circuit court, with costs and interest. It is decided in this cause that a misstatement of his age by an applicant for insurance does not necessarily avoid a policy, and that the minute book of a lodge of Odd Fellows is not competent evidence to show the age of a member.

Nos. 655, 656, 657, 658. *The Chesapeake & Ohio Railroad Company, plaintiff in error, v. The Commonwealth of Virginia.* In error to Supreme Court of Appeals of Virginia. Mr. Justice Strong delivered the opinion of the court, affirming the judgments of said supreme court in these causes, with costs and interest. Dissenting, Hunt and Field, JJ. These causes involved a construction of the statutes concerning the taxation of the property of the company. The question was as to the extent of the exemptions.

Nos. 225, 226. *Benj. Stack, appellant, v. Lewis M. Starr*; No. 227. *Benj. Stack, appellant, v. Chas. P. Bacon et al.* Appeal from the Circuit Court of the United States for the District of Oregon. Mr. Justice Field delivered the opinion of the court, affirming the decrees of said circuit court in these causes, with costs. The court in these causes considers the question when a former judgment bars a subsequent suit, and other points not of general interest.

No. 239. *Wm. D. Stewart, Administrator, &c., et al., appellants, v. Ezekiel Salamon et al.* Appeal from Circuit Court of the United States for the Southern District of Georgia. Mr. Justice Field delivered the opinion of the court, reversing decree of said circuit court, with costs, and remanding the cause for further proceedings in conformity with the opinion of this court. The point of contention in this case was whether a note was originally solvable in Confederate currency or in the legal currency of the United States. The circuit court held that it was solvable in legal currency, and was so intended by the parties. The evidence showed that the transaction, for which the note was in part given, was in Confederate currency. At the time it was made the treasury notes of the Confederate government constituted the principal currency of Georgia, where the transaction took place. It was to them that reference was always made when dollars were mentioned, unless coin was specified. This condition of things appearing, the presumption, it is decided, is that the parties had those notes in contemplation, and the decree is, therefore, reversed.

No. 217. *A. J. Davis, appellant, v. Harvey Alword.* Appeal from Supreme Court Territory of Montana. Mr. Justice Field delivered the opinion of the court, reversing the decree of said supreme court, with costs, and remanding the cause with directions to enter a decree in conformity with the opinion of this court. The points decided in this case are as follows:—

1. A suit to recover judgment for labor performed by the plaintiff upon a quartz mill and mine in Montana Territory, and to enforce a mechanic's and laborer's lien upon the defendant's interest in the premises for the payment of the judgment, is a suit in equity, requiring specific directions for the sale of the property, such as are usually given upon the foreclosure of mortgages and sale of mortgaged premises. The fact, that according to the modes of procedure adopted in the territory, a personal judgment for the amount found due is usually rendered in such cases, with directions that, if the same

be not satisfied out of other property of the debtor, the property, upon which the lien is adjudged to exist, shall be sold, and the proceeds applied to its payment, does not change the character of the suit from one of equitable cognizance, and convert it into an action at law.

2. Mechanics and laborers asserting a lien upon real property for their work, and claiming priority over mortgagees and others, who have acquired interests in the property, must furnish strict proof of all that is essential to the creation of the lien; and that requires them to prove when the work was commenced, the character of the work, and when it was completed.

3. Work was done by the plaintiff under a contract with the defendant, made August 1st, 1869, on two distinct parcels of property situated in Montana Territory — one a quartz mill and the other a quartz mine, separated a considerable distance from each other. The work on the mill was completed in the fall of 1869 or in the summer of 1870. Nothing was done afterwards except to make occasional repairs as they were needed. The work on the mine was done in 1870, but it was not shown when the work was commenced. In June, 1871, upon an accounting between the plaintiff and the defendant, there was found due to the plaintiff a large sum, which the parties agreed should be a lien upon the mill and mine in equal proportions. Notices claiming a lien upon each for the amount as thus apportioned were accordingly filed in the recorder's office: *Held*, 1st. That a lien did not arise from this contract of apportionment, or from the special contract under which the work was done, but from the work itself which was performed upon the property; 2d. That the work being done on different parcels of property, the lien claimed on one was to be considered separately from the lien claimed on the other; 3d. That the notice, so far as the mill was concerned, was filed too late, the statute requiring the notice to be filed within sixty days after the completion of the work; and that the occasional repairs subsequently made could not be added to the work done months before, so as to render the whole work one continued performance for which a single lien could be claimed within sixty days after the last repairs; 4th. That it not appearing when the work upon the mine was commenced in 1870, it will not be presumed that it was commenced before the mortgage of the defendant was executed and recorded in September of that year, so as to give to the lien for the work priority over the mortgage.

No. 682. *W. W. Boyd, Jr., et al., plaintiffs in error, v. The State of Alabama*. In error to the Supreme Court State of Alabama. Mr. Justice Field delivered the opinion of court, affirming the judgment of said supreme court, with costs. This case was as follows: The defendant having been indicted under a statute of Alabama for setting up and carrying on a lottery without legislative authority, claimed in defence a right to set up and carry on the lottery in question under a subsequent statute passed on the 10th of October, 1868; this latter statute was repealed in March, 1871. It was admitted on the trial that the acts charged against the defendant were done under that statute, and would be legal if the statute were constitutional and had not been repealed. That statute required the defendant and certain other parties associated with him, before exercising the right claimed, to deposit in the treasury of the state, to the credit of the school fund, and for educational purposes, two thousand dollars, and annually thereafter the same sum for twenty years, or so long as they might do business under the act, and that sum had been deposited. Under a previous indictment against the same defendant for a similar offence, the supreme court of the state had held that the statute in question constituted a contract, and that the repealing act was for that reason void. In that case the only matter before the court was the meaning of the statute; its constitutionality was not called in question. On the trial of the case at bar the defendant relied upon that decision of the court, but he was, nevertheless, convicted and sentenced. On appeal to the supreme court of the state the judgment was affirmed, the court deciding that the statute of October 10th, 1868, was unconstitutional: *Held*, that the previous adjudication of the court upon the meaning of the statute, — that it constituted a contract between the defendant and the state, — did not estop the state from denying its constitutionality in the present case, nor conclude the court upon that question, although the point might have been raised and determined in the first instance.

No. 1042. *Charles Forbes, appellant, v. Thomas Gracey et al.* Appeal from the Circuit Court of the United States for the District of Nevada. Mr. Justice Miller delivered the opinion of the court, affirming the decree of said circuit court, with costs. Mr. Justice Field took no part in the decision of this cause. This was a suit brought by appellant to enjoin the collector of taxes for Storey County, Nevada, from collecting a tax imposed by the law of that state upon the property of the Consolidated Virginia Mining Company,

the appellant being a stockholder in the company and an alien subject of the Queen of Great Britain. The tax was by the state statute imposed upon the proceeds of the mine worked by the corporation, and was resisted on the ground that title to the land from which the mineral was taken was in the United States, and is not for that reason liable to state taxation. The court below dismissed the bill and the decree is here affirmed.

No. 32. *The United States, plaintiff in error, v. Antonio Joseph*; No. 33. *The United States, plaintiff in error v. Juan Santistevan*. In error to the Supreme Court of the Territory of New Mexico. Mr. Justice Miller delivered the opinion of the court, affirming the decrees of said supreme court in these causes. The opinion in these causes defines the rights of the Pueblo Indians in New Mexico.

No. 250. *J. C. Davis et al., plaintiffs in error, v. State of Indiana, ex rel.* The Board of Commissioners of Bartholomew County, in error to Supreme Court State of Indiana. Mr. Justice Miller delivered the opinion of the court, affirming the judgment of said supreme court, with costs. This cause involved only a construction of the statutes of Indiana affecting her public schools, the court coinciding with the views of the state court in every particular.

No. 249. *J. B. Lippincott & Co., appellants, v. N. C. Mitchell, by her next friend Price Williams*. Appeal from Circuit Court of United States for Southern District of Alabama. Mr. Justice Swayne, delivered the opinion of the court, affirming the decree of said circuit court, with costs. Dissenting, Mr. Justice Strong. This case was as follows: The premises in question were conveyed to the appellee, Nannie C. Mitchell, by deed duly executed, bearing date on the 19th day of March, 1868. On the 17th of February, 1869, the said Nannie C. Mitchell, and J. C. Mitchell her husband, mortgaged the premises to the appellants, J. B. Lippincott & Company, to secure the payment of certain liabilities therein described. The instrument contained a power of sale. The mortgagees advertised the property to be sold pursuant to the power. She thereupon filed this bill to enjoin the sale, upon the ground that under the law of Alabama she was incompetent thus to encumber the property, and that the mortgage was, therefore, void. The circuit court decreed a perpetual injunction and the decree is here affirmed.

No. 15, original. *N. W. Casey, Receiver, &c., plaintiff, v. Count Goffredo Galli*. Action for debt. Mr. Justice Swayne delivered the opinion of the court, giving judgment for plaintiff, with costs. This cause involved no question of general interest.

No. 208. *Ann Davis et al., plaintiffs in error, v. Ann Crouch et al.* In error to Supreme Court of Appeals State of Virginia. Mr. Chief Justice Waite delivered the opinion of the court, dismissing the writ of error in this cause for the want of jurisdiction. The decision in this case is an affirmance of the rule often announced, that a decree of reversal of a state court is not a final decree reviewable in this court.

No. 246. *D. F. Gunn, Guardian, &c., appellant, v. I. C. Plant et al.* Appeal from Circuit Court of United States Southern District of Georgia. Mr. Chief Justice Waite delivered the opinion of the court, reversing the decree of the said circuit court, with costs, remanding the cause with instructions to proceed in conformity with the opinion of this court, and as law and justice may require. The question presented in this case was determination whether a judgment otherwise duly entered is void, if the verdict on which it is predicated has not been recorded in the minutes. "It is very clear," say the court, "that a decision of a court is not technically a judgment until in some form it has been entered of record. If entered in the course of judicial proceedings, of which the court has jurisdiction, it is binding until reversed or set aside, no matter how irregular it may be as to matters of form. *Cooper v. Reynolds*, 10 Wall. 316. In this case a judgment was entered in due form. As a judgment it was complete. There had been a verdict, and that appeared among the files in the cause. It was within the power of the court, therefore, to enter the judgment. The only defect in the proceedings is an omission to properly record the verdict. That seems to us an irregularity only. The court had jurisdiction of the cause and of the parties, and in due course of proceeding had the power to enter the judgment and did so." The judgment is, therefore, held to be valid.

No. 216. *Luther H. Pike et al., appellants, v. John Wassell, appellee*, from the Circuit Court of the United States for the Eastern District of Arkansas. Mr. Justice Waite delivered the opinion of the court, reversing the decree of the said circuit court, with costs, remanding the cause with instructions to proceed in conformity with the opinion of this court, and as law and justice may require. It is decided in this case that where seizure is made by the United States under the confiscation acts after the levy of an attachment, the attachment lien is not divested, but remains and may be enforced.

No. 718. *The Pittsburg Locomotive and Car Works, plaintiffs in error, v. The State Na-*

tional Bank of Keokuk. In error to the Circuit Court of the United States for the District of Iowa. Mr. Chief Justice Waite delivered the opinion of the court, dismissing the writ of error in this cause for the want of jurisdiction. The only matter in dispute between the parties was a judgment of \$1,508 recovered against the plaintiff in error and the surety upon the delivery bond. The plaintiff had the possession of the property, and both that and the ownership had been adjudged in its favor, except to the extent of the lien which the defendants had to secure the payment of the judgment. Of this the defendants did not complain, so that the only question was whether the judgment for the money was properly rendered against the plaintiff. The case was not one where the value of the property in controversy showed the value of the matter in dispute, as was that of *Bennett v. Butterworth*, 8 How. 128.

Adjourned to the time and place appointed by law.

DIGEST OF CASES

PUBLISHED IN EXTENSO IN LATE ISSUES OF AMERICAN LEGAL PERIODICALS.

ABBREVIATIONS.

Albany L. J. — *Albany Law Journal*, Albany, N. Y., WEED, PARSONS & CO.
 Am. Law Rec. — *American Law Record*, Cincinnati, O., H. M. MOOS.
 Am. Law Reg. — *American Law Register*, Philadelphia, Pa., D. B. CANFIELD & CO.
 Cent. L. J. — *Central Law Journal*, St. Louis, Mo., SEYMOUR D. THOMPSON.
 Chicago L. N. — *Chicago Legal News*, Chicago, Ill., CHICAGO LEGAL NEWS CO.
 Ins. L. J. — *Insurance Law Journal*, New York, C. C. HINE, 176 Broadway.
 Int. Rev. Rec. — *Internal Revenue Record*, New York, W. P. & F. C. CHURCH.
 La. L. J. — *Louisiana Law Journal*, New Orleans, La.
 Leg. Chron. — *Legal Chronicle*, Pottsville, Pa., SOL. FOSTER, JR.
 Leg. Int. — *Legal Intelligencer*, Philadelphia, Pa., J. M. POWER WALLACE.
 Mo. Jur. — *Monthly Jurist*, Bloomington, Ill., T. F. TIPTON.
 N. B. R. — *National Bankruptcy Register*, New York, CAMPBELL & CO.
 Pac. Law Rep. — *Pacific Law Reporter*, San Francisco, Cal., J. P. BOGARDUS.
 Pittsb. L. J. — *Pittsburg Legal Journal*, Pittsburg, Pa., J. W. & J. S. MURRAY.
 W. L. R. — *Washington Law Reporter*, Washington, D. C., JNO. L. GINCK.
 W. N. C. — *Weekly Notes of Cases*, Philadelphia, KAY & BRO.
 West. Jur. — *Western Jurist*, Des Moines, Iowa, MILLS & CO.

ATTORNEY.

See CONTEMPT; CONTRACT 1.

BANKRUPTCY.

1. MORTGAGE. — PREFERENCE. — To sustain a mortgage, otherwise invalid as a preference, upon the ground of a promise to give security, made at the time of the loan, the prior promise must contemplate the giving of a specific and definite security — such an agreement as could be enforced by a bill for specific performance. *In re Jackson Iron Manufacturing Co.*, D. C. U. S. E. D. Mich., 15 N. B. R. No. 10.

2. DISCHARGE CANNOT BE IMPEACHED COLLATERALLY. — A discharge duly granted under the bankrupt act cannot be impeached in a collateral action on the ground that it was obtained by fraud. *Smith v. Ramsey*, S. C. C. Ohio, Ib.

3. PRACTICE. — WHERE A HUSBAND, BEING INSOLVENT, HAS PURCHASED FURNITURE AND ARTICLES OF LUXURY AND GIVEN THEM TO

HIS WIFE, such gift does not *ipso facto* constitute an adverse interest in the wife; but the bankrupt court, upon a petition of the assignee for possession of such property, may require the bankrupt to answer the petition, and if it shall then appear that the wife really has any adverse interest, she will be permitted to have her right ascertained in an independent proceeding. *In re Pierce & Whaling*, C. C. U. S. E. D. Wisc., *Ib.*

4. THE ASSIGNEE ACQUIRES NO TITLE TO PROPERTY EXEMPT AS A HOMESTEAD by the law of the state, although the bankrupt owned no other property not exempt by the bankrupt law, and the homestead was not ascertained and set apart until after the conveyance to the assignee was executed. *In re Bass*, C. C. U. S. So. D. Ga., *Ib.*

5. *IBID.* — A PRIOR AGREEMENT BY THE BANKRUPT WITH A CREDITOR TO WAIVE HIS RIGHT to such exemption confers no power on the bankrupt court over such property. The creditor claiming under such agreement must proceed in the state courts. *Ib.*

6. DISCLOSURE BY BANKRUPT. — On an application to review the decision of the district court upon the question whether the bankrupt has made a full disclosure in obedience to an order requiring it, the petitioner must satisfy the court that the relation given by the bankrupt is such that a reasonable man would not be able to credit it, but would be satisfied of its substantial untruth. *In re Mooney*, C. C. U. S. So. D. N. Y., *Ib.*

7. CHECK. — FAILURE TO PRESENT BEFORE BANKRUPTCY. — Where one who has purchased a check of one bank upon another fails to present it for payment until the drawer has been adjudged a bankrupt, he is not entitled to priority of payment from the fund in the hands of the assignee, although there were sufficient funds in the hands of the drawee at the time of presentment to pay the check. Such check creates no appropriation of or lien upon the fund in the bank, nor does it give a right of action against the drawee. *In re Smith*, D. C. U. S. So. D. Ohio., *Ib.*

8. A CLAIM FOUNDED UPON A JUDGMENT RECOVERED AFTER COMMENCEMENT OF PROCEEDINGS in bankruptcy, without leave of the bankrupt court, cannot be proved. *In re Maybin*, D. C. U. S. N. D. Miss., *Ib.*

9. THE LIABILITY OF A GUARDIAN TO HIS WARD is not affected by his discharge in bankruptcy. *Ib.*

10. PROOF OF CLAIMS MAY BE FILED AFTER AN ORDER DISCHARGING THE ASSIGNEE has been set aside, and the assignee ordered to proceed. *Ib.*

11. LIMITATIONS. — THE FILING OF THE PETITION arrests the running of the statute of limitations. *Ib.*

12. PRACTICE, ETC. — SO LONG AS THERE IS FUND TO DISTRIBUTE, all those who had valid, subsisting claims existing at the time of the commencement of the proceedings, upon making proof, will be permitted to participate in it. *Ib.*

13. WHERE A PAYMENT MADE BY A BANKRUPT DEBTOR HAS BEEN RECOVERED BY HIS ASSIGNEE in bankruptcy, the acceptance of such payment with knowledge of the debtor's insolvency is no defence to an action by the creditor against the surety for the amount thereof, where the creditor has acted in good faith towards the surety and has been reasonably diligent to save him from loss. The surety is liable for the amount of such

payment, although he has in the mean time paid the balance of the indebtedness and taken up the evidence thereof. *Watson v. Poague*, S. C. Iowa, *Ib.*

14. PREFERENCE. — SUBSTITUTION OF ONE CLASS OF SECURITY FOR A LESS DESIRABLE ONE, ETC. — Where an insolvent, with knowledge of his condition and with intent to give his bank a preference, substitutes small notes, payable immediately, for older and larger ones held by the bank, some of which have already matured, such substitution, as a condition for a further loan, having been demanded by the president of the bank with knowledge of the insolvent's condition, and thereby the bank is enabled more easily to and does obtain judgment upon said notes, and seize and sell the insolvent's property upon executions issued thereon, such seizure and sale will be declared void, and the amount realized at the sale will be ordered paid to the assignee of such insolvent. *Loudon v. First National Bank of Wilmington*, D. C. U. S. E. D. N. C., *Ib.*

15. *IBID.* — KNOWLEDGE OF INSOLVENCY. — Where a bank demands of a depositor, who has theretofore always been prompt in his payments, and who has a note overdue and others about to mature, which he has made no arrangements to meet, that he shall, as a condition of a further loan which he requires to meet a borrowed note, substitute smaller notes, payable immediately, for those then held by the bank, and also for such further loan, in order to enable it more easily to obtain judgment thereon. *Held*, that the demand was made with knowledge of the applicant's insolvency. *Ib.*

16. FIDUCIARY CAPACITY. — A DEBT DUE BY A FACTOR for the value of goods consigned to him, to be sold on commission and remittance made in thirty days, is not such a debt contracted in a fiduciary capacity as will be excepted from the operation of a discharge. *Owsley v. Cobin*, C. C. U. S. S. C., 15 N. B. R. No. 11.

17. TERMINATION WITHOUT DISCHARGE. — SECTION 5105 CONTINUED. — Where assets have come into the hands of the assignee, and he has not rendered his final account within three years from the adjudication, and the bankrupt has not been discharged or refused a discharge, the proceedings are not terminated without a discharge, within the meaning of section 5105 of the Revised Statutes, so as to revive the right of action by a creditor who has proved his claim. *Wood v. Hazen*, S. C. N. Y., *Ib.*

18. THE BANKRUPT LAW DOES NOT INTERFERE WITH THE DEBTOR'S POWER TO SELL HIS EXEMPT PROPERTY. — The Bankrupt Act of 1867, while adopting the exemption laws of the states as to the measure and amount thereof, does not embrace local restrictions upon the debtor's estate in and dominion over exempted property. *Farmer v. Taylor*, S. C. Ga., *Ib.*

BILLS AND NOTES.

1. NOTE INDORSED BY FOUR PERSONS. — LIABILITY OF INDORSERS. — A promissory note was indorsed, "For the amount of the within note received, I hereby guarantee its prompt payment," &c., which guaranty was signed by the payee and three others. In a suit by a holder for value against the last of the guarantors: *Held*, that the guaranty necessarily applied to the holder for value, and that the omission in it to indicate to whom it was made was supplied by the advancement of money upon it.

Held further, that the contract of each subscriber was sufficient to make him severally liable, and that therefore the suit was properly brought. *Douglass v. Second National Bank*, S. C. Pa., W. N. C., July 5, 1877.

2. WHEN ONE DRAWS A NOTE PAYABLE TO HIMSELF, there is no contract until he indorses it to some one, and his indorsement then becomes a direct, not a contingent, liability. He is maker in fact, and is not entitled as indorser to notice of dishonor. *Aughinbaugh v. Roberts*, S. C. Pa., W. N. C., July 12, 1877.

See BANKRUPTCY, 14, 15; CERTIFICATE OF DEPOSIT; CHECK.

BROKER.

COMMISSIONS. — PROMISE AFTER COMPLETION OF TRANSACTION. — A broker employed by A. to negotiate an exchange of properties between him and B. cannot recover commissions of B., although after the exchange was effected he expressly promised to pay. *Lynch v. Fallon*, S. C. R. I., Am. Law Reg., June, 1877.

BUILDING ASSOCIATION.

1. MARRIED WOMAN. — MORTGAGE. — A married woman cannot become a member of a building association, nor bind herself to them by bond and mortgage for the repayment of a loan, together with premiums, fines, and dues. If she attempts so to do, all that the building association can recover on the mortgage is the actual amount of money advanced to and used by her in the improvement of her separate estate, with legal interest. W. and wife gave a bond and mortgage to a building association, by which, in consideration of a sum of money loaned for the improvement of the wife's separate estate, they bound themselves to pay a larger sum, the wife assigning to the association as collateral security certain shares of their stock held by her, and agreeing to pay the dues thereon, or in default thereof certain fines to the association. On a *sci. fa.* upon the mortgage: *Held* (reversing the court below), that the wife was bound only to the extent of the actual money received by her, together with legal interest. *Wolbach v. Lehigh Building Assn.*, S. C. Pa., W. N. C., July 5, 1877.

2. *IBID.* — USURY. — The Act of 12 April, 1859 providing that the premium and fines accruing to a building association should not be deemed usurious, does not apply to a loan by such association to a married woman. *Ib.*

CERTIFICATE OF DEPOSIT.

LIMITATIONS. — NATURE OF CERTIFICATE OF DEPOSIT. — Certificates of deposit, payable at their return to the bank, properly indorsed, are in legal effect promissory notes payable on demand, and the statute of limitations begins to run against them from their date, and no one can be held a *bond fide* purchaser of them who does not take them within a short time after their issue. It seems that two years and four months is too long. Certificates of deposit are not within Comp. Laws, § 7151, exempting bank bills, notes, and other evidence of debt from the operation of the statute of limitations. *Tripp v. Curtemirs*, S. C. Mich., Chicago L. N., June 30, 1877.

CHECK.

See BANKRUPTCY, 7.

CONTEMPT.

FOR SNEERING, INSULTING, AND DISRESPECTFUL LANGUAGE USED BY AN ATTORNEY to a judge before whom a matter is pending, concerning such matter and the judge's ruling thereon, the attorney may be punished by a fine, as for a contempt. Such language as the following, coming from an attorney to a judge in a matter still pending before him: "The ruling you have made is *directly contrary to every principle of law, and everybody knows it*, I believe;" and that it is "my desire that *no such decision shall stand unreversed in any court I practise in*," is insulting and disrespectful. It is immaterial whether this language is used in an oral address in the hearing of others, or in a written communication to the judge. An attorney, as an officer of the court, is under special obligations to be considerate and respectful in his conduct and communications to the court or judge. *In re Prior*, S. C. Kans., Am. Law Reg., June, 1877.

CONTRACT.

1. AGREEMENT BETWEEN ATTORNEYS. — HOW FAR BINDING UPON CLIENTS. — While suit for divorce was pending, an agreement was signed by counsel, but not by either of the parties, providing that the husband might "retain all real estate, ... however received:" and then, no defence being interposed, a decree of divorce not referring to the agreement passed by default for the wife. *Held*, that it would not be presumed the attorneys had authority to make this agreement, and that it did not bind the wife; and further, that she was not estopped from asserting title to property previously conveyed by her directly to her husband by a deed which, for that reason, was void. *Brooks v. Kearns*, S. C. Ill., Chicago L. N., July 7, 1877.

2. HIRING HORSE ON SUNDAY. — INJURY TO VEHICLE. — A statute being in force and providing that "every person who shall do or exercise any labor or business, or work of his ordinary calling, on the first day of the week, or suffer the same to be done by his children, servant, or apprentices, works of necessity and charity only excepted, shall be fined not exceeding —:" S., a livery-stable keeper, let, in his ordinary business, a horse and carriage to be driven for pleasure to a particular place. The hirer drove them to a different place, and returned them damaged, whereupon S. brought trover against the hirer. *Held*, that the action would not lie. *Mattison J.*, S. C. R. Ill., Chicago L. N., May 19, 1877.

See BROKER; INSANITY.

CRIMINAL LAW.

1. MURDER. — CHARGE OF COURT. — MISAPPREHENSION OF JURY, ETC. — One, who in consequence of a mistaken though reasonable apprehension of bodily harm, caused by the threatening manner of another, shoots him with a pistol, should not be convicted of murder in the first degree, although he fired with an intent to kill, and although the danger he apprehended was not great enough to warrant his taking the life of his assailant. Where, on a homicide trial, the idea intended to be conveyed by the charge of the court below is correct, but owing to the manner in

which it was expressed in the hurry of the trial, the jury may have been misled as to the law, the judgment will be reversed. In answering points upon which the court has been requested to charge, the judge is not obliged to simply affirm or negative them, but it is proper to give such explanations or qualifications as will enable the jury to understand them. *Pistorious v. Commonwealth*, S. C. Pa., W. N. C., June 21, 1877.

2. COMPETENCY OF JUROR. — FIXED OPINION FROM READING. — A juror testified on his *voir dire* that he had a fixed opinion from what he had read, but that it was not such an opinion as would influence him in any degree as a juror to give undue weight to evidence against the prisoner, and that he felt certain he could divest his mind of all prejudice and be controlled only by the evidence: *Held*, that he was competent, inasmuch as he had no fixed belief of the guilt of the prisoner, and had no opinion founded upon the evidence to be given. *Curley v. Commonwealth*, S. C. Pa., W. N. C., June 28, 1877.

3. A JURY WHEEL WAS DEPOSITED BY THE JURY COMMISSIONERS FOR SAFE KEEPING IN THE VAULT OF THE COUNTY TREASURER in the court-house, upon condition that no one should enter the vault for the wheel but a jury commissioner. The key of the vault was in possession of the sheriff of the county: *Held*, that inasmuch as the law had not provided an office for the jury commissioners, nor a place of safety for the wheel, the custody of the wheel was sufficient. *Ib.*

4. DECLARATIONS OF ACCUSED. — RES GESTÆ. — Declarations of the accused, made an hour before the killing, to the effect that the deceased had been following the accused for a long time to kill him; that he was in fear of his life when he saw deceased; and that he was going to leave the county to avoid a difficulty with the deceased, *held* inadmissible: not being a part of the *res gestæ*, must have been made at the time the act was done which they are supposed to characterize, and calculated to unfold the quality of the facts they are intended to explain, and so to harmonize with them as obviously to constitute one transaction. *State v. Evans*, S. C. Mo., Cent. L. J., July 6, 1877.

5. MURDER. — PRESUMPTIONS. — If the accused killed the deceased by shooting him with a pistol, the law presumes it is murder, in the absence of proof to the contrary. To constitute murder in the first degree, the deliberate purpose to take life or do some great bodily harm should exist and be shown by the evidence alone; while murder in the second degree may be made to appear from the killing alone, the accused failing to explain by evidence that it was done in a less criminal manner. *Ib.*

DAMAGES.

See INTOXICATING LIQUORS.

DEED.

A DEED BETWEEN HUSBAND AND WIFE is absolutely void at law, and, therefore, it will not be enforced in equity. Where a deed is made by a wife directly to her husband, but there is nothing upon its face to show the relation between them, such a deed, though void, is a cloud upon title, as evidence *aliunde* is necessary to establish its invalidity. *Brooks v. Kearns*, S. C. Ill., Chicago L. N., July 7, 1877.

EASEMENT.

LIGHT AND AIR. — THE RULE IN INDIANA. — An easement in light or air, to be supplied from the premises of another, cannot be acquired in the State of Indiana by mere use or prescription, but may be granted by deed or created by contract. There is no statutory law of the state recognizing the English doctrine on this subject, nor was it adopted by the common law into the state. *Stein v. Hauck*, S. C. Ind., Cent. L. J., June 22, 1877.

EVIDENCE.

See CRIMINAL LAW, 4.

HUSBAND AND WIFE.

See BUILDING ASSOCIATION; DEED.

INSANITY.

EXECUTED CONTRACT MADE WITH INSANE PERSON. — Where a person contracts in good faith with one who is apparently of sound mind, and the contract is completed and executed, and the parties cannot be placed *in statu quo*, the contract cannot be set aside either by the lunatic, or those who represent him. *Scanlan v. Cobb*, S. C. Ill., Chicago L. N., June 30, 1877.

INSURANCE.

1. AGREEMENT OF AGENT TO GIVE NOTICE AS TO PREMIUM. — RATIFICATION. — ESTOPPEL. — The general agent of a company agreed with the assured to notify her of the falling due of the premiums. Notices were regularly sent by the company for all payments of premium except that immediately preceding the death of the assured, for which no notice was received by her, and which consequently was not paid. The policy contained a clause of forfeiture for non-payment of premium when due: *Held*, that it was properly left to the jury to determine whether the company by their conduct misled the assured, and caused her to pass the time, relying upon the notice to be given, and were therefore estopped from setting up the clause of forfeiture. *Globe Mutual Life Ins. Co. v. Johns*, S. C. Pa., W. N. C., June 21, 1877.

2. CONSTRUCTION OF POLICY. — MORTGAGE. — OTHER INSURANCE, ETC. — The policy provided that other insurance without consent, or a sale or transfer or mortgage of the property without notice, should avoid it; also that in case of other insurance, the insured might recover only a *pro rata* share of the loss; also that no sale or transfer of the property should vitiate the right of the mortgagee to recover. The loss was payable to the mortgagee. The insured subsequently placed a second mortgage on the property without consent, which was foreclosed by the mortgagee, who procured additional insurance without consent. *Held*, in a suit by the first mortgagee to recover, that the clauses relating to other insurance were not intended to defeat the rights of the parties by the acts of strangers for which they are not responsible; that the second mortgage without consent defeated the right of the insured, but not of the first mortgagee, to recover; and that the *pro rata* clause did not apply,

and the mortgagee was entitled to recover the full amount irrespective of other insurance. *City Five Cent Sav. Bank v. Penn. Fire Ins. Co.*, Ins. L. J., June, 1877.

INTOXICATING LIQUORS.

DAMAGES UNDER LIQUOR LAW. — In an action for damages against a saloon keeper, the word *damages* should be construed with reference to its known legal signification; that is, such damages as in legal contemplation, are to be regarded as the result of the wrongful act; that it does not follow because a person, while in a state of intoxication, receives an injury, that it can be said in a legal sense that the intoxication caused the injury. *Shugart v. Egan*, S. C. Ill., Mo. Jur., July, 1877.

LIMITATIONS.

See **BANKRUPTCY 11**; **CERTIFICATE OF DEPOSIT**.

MARRIED WOMAN.

See **BUILDING ASSOCIATION**; **DEED**.

MORTGAGE.

MORTGAGE OF AFTER-ACQUIRED PROPERTY. — A mortgage made to secure debts maturing at a future day, which conveys a stock of goods in a particular store, and any other goods which may from time to time, during the existence of the mortgage, be purchased by the grantors and put into said store to replace any part of said stock which may have been disposed of, or to increase and enlarge the stock now on hand, is void *per se*. *Phelps v. Murray*, Ch. Ct., Nashville, Tenn., Cent. L. J., June 22, 1877.

See **BANKRUPTCY, 1**; **BUILDING ASSOCIATION**; **INSURANCE, 2**.

MUNICIPAL BONDS.

1. ELECTION. — **PRESUMPTIONS AS TO VOTES CAST AT.** — The presumption is, that the vote cast at an election held according to law is the vote of the whole number of legal voters, and this presumption cannot be rebutted by proof of the number of votes cast at an election held in the preceding year. *Melvin v. Lisenby*, S. C. Ill., Cent. L. J., July 6, 1877.

2. REGISTRATION UNDER ILLINOIS STATUTE OF APRIL 16, 1869. — Under a law authorizing a county to subscribe to the stock of a railroad company, upon condition that a majority of the votes cast at an election on the question should be in favor of it, an election was held, resulting in a majority in favor of the subscription, and the subscription was made and bonds issued: *Held*, that the bonds were rightfully registered in the auditor's office under the Funding Act of April 16, 1869, which requires that the subscription, upon which bonds sought to be registered were issued, should have been voted for by a majority of the legal voters living in the county; it being the presumption that the vote, cast at the election on the question of subscription, was that of all the voters of the county. *Ib.*

3. NOT VOID BY REASON OF DEFECTIVE EXECUTION. — Where bonds

of a county are legally authorized to be issued by a vote of the people, and, by the law authorizing the vote, it is provided that the bonds shall be executed by certain officers, and countersigned by the treasurer of the county; it was *held*, that the omission of the treasurer to countersign the bonds is a mere defect in the execution of them, which a court of equity would, in the absence of a remedy at law, ordinarily supply, and that an injunction restraining the collection of taxes for the payment of such bonds should not be allowed. *Ib.*

NEGLIGENCE.

CONTRIBUTORY NEGLIGENCE. — RAILROAD CROSSING. — DEAF PERSON, ETC. — F., a partially deaf man, drove a wagon up a steep slope, to a railroad crossing at grade on a road with which he was familiar. At about five feet from the railroad the company had recently erected a watch-house which obstructed the view to the north for about eight feet. Back of the watch-house was an open space for about thirteen feet through which there was an unobstructed view of the railroad. Beyond this the view was again closed by some buildings. F. drove past the buildings and the open space and stopped opposite the watch-house. He then looked in both directions, though it was impossible for him to see towards the north. Without leaving his wagon, he then drove on the track and was killed by a train. *Held*, that under the circumstances there was a clear case of contributory negligence, and the judge should have directed a verdict for the defendant. *Cent. R. R. of N. J. v. Feller*, S. C. Pa., W. N. C., July 5, 1877.

PARTNERSHIP.

AGREEMENT TO INDEMNIFY RETIRING PARTNER. — It is the duty of a partner who has agreed to indemnify his retiring copartner from existing contracts and obligations of the firm, to ascertain the extent and nature of a liability of the existence of which he has knowledge, and, if he fail to do so, his ignorance thereof is no defence to an action for not keeping the retiring partner indemnified. *Farrington v. Woodward*, S. C. Pa., W. N. C., June 28, 1877.

RAILROAD.

See NEGLIGENCE; RECEIVER.

RECEIVER.

APPOINTMENT OF RECEIVER OF RAILROAD. — A court of equity will not appoint a receiver of a railroad merely upon a showing that there has been a default in the payment of interest, secured by a mortgage of the property and income of the company, that upon such default the trustees under the mortgage were entitled to immediate possession, that they have demanded possession, and that the same has been refused. It is necessary, in addition to this, to show that ultimate loss will happen to the beneficiaries under the mortgage by permitting the property to remain in the hands of its owners until final decree and sale, if such decree and sale be made. The facts in this case examined, and held not to exhibit such danger to the bondholders as will warrant the appointment of a receiver.

The case of *Williamson v. New Albany R. R. Co.* 1 Bissell, 198, followed. *Union Trust Co. v. St. Louis, Iron Mountain & So. R. R. Co.*, C. C. U. S. E. D. Mo., Cent. L. J., June 22, 1877.

RES GESTÆ.

See CRIMINAL LAW, 4.

SUNDAY.

See CONTRACT, 2.

VENDOR AND VENDEE.

SALE OF CHATTELS. — EVICTION. — Where defence is made to the payment of purchase money for breach of warranty of title, there should be proof of eviction or of an involuntary loss of possession. While the vendee holds the covenant and retains the possession he cannot withhold the purchase money. *Krumbhaar v. Birch*, W. N. C., June 28, 1877.

CIRCUIT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK.

[JUNE, 1877.]

COPYRIGHT. — LABELS DEPOSITED UNDER ACT OF JUNE, 1874. — PUBLICATION BEFORE COPYRIGHT.

MARSH v. WARREN.

The Act of Congress of June 18, 1874, is to be regarded as an amendment of the copyright laws. To acquire a copyright in any print or label deposited in the patent office it is essential that the title of the print or label be first deposited in pursuance of the provisions of the Revised Statutes concerning copyrights.

A. Broadnax, for the complainants.

Hall & Blandy; *contra*.

BLATCHFORD, J. The statutory provisions which confer the rights and regulate the remedies of persons who register in the patent office under the Act of June 18, 1874 (18 U. S. Stat. at Large, 78), prints or labels designed to be used for any other articles of manufacture than pictorial illustrations and works connected with the fine arts, are those which are contained in sections 4948 to 4971 of the Revised Statutes in regard to copyrights. The exclusive right of printing and publishing given by section 4952 is given to the author or proprietor only on complying with the provisions of sections 4948 to 4971. One of those provisions (§ 4956) is that no person shall be entitled to a copyright unless he shall, "before publication," deliver at the proper office (in this case the patent office) a printed copy of the title of the article in respect of which the copyright is to be claimed.

In the present case the first label and its title were registered September 24, 1875. I understand the bill to state that this label was used by the plaintiffs' assignors, in the sale of their mixture and of the bottles containing it, to which such label was affixed before that date, and as early

as the mixture itself was sold, to wit, June and July, 1875. The sale of the bottles of the mixture with the label on it was a publication of the label. At all events the bill does not allege that the title and label were deposited before the publication of the label. Such averment is necessary.

As to the other three labels, they and their titles were registered March 20, 1877, and I understand the bill to state that those labels were used by the plaintiffs before that date, in the sale of the mixture.

The motion for an injunction is denied.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

(To appear in 121 Mass.)

WAGERING CONTRACT DEFINED, ETC.

MORGAN v. BEAUMONT.

A party to an illegal wager, who demands his money from a stakeholder before it is paid over, is not *in pari delicto*, and can recover his deposit from him; and the fact that the defendant knew of and promoted the wager affords him no protection.

In an action by a party to an illegal wager on a horse race, to recover back money deposited with a stakeholder, the defendant alleged in his answer that, in order to have the race to decide the wager, it was necessary to incur expenses for the use of the race-ground and other expenses, for which the defendant was liable; that he paid a portion of the money received from entrance fees to the race-ground to the plaintiff to pay a part of such expenses, and claimed to recoup this money and the money in his hands from the wager. He also filed a declaration in set-off for the money paid to the plaintiff. *Held*, that neither the answer in recoupment nor the declaration in set-off could be sustained.

CONTRACT for money had and received. The answer set up that the money was handed to the defendant to hold as stakeholder, on a wager as to the result of a horse race, and was to be paid to the winner; that both the plaintiff and the defendant knew that the wager was illegal, and aided and abetted in the race. The answer also alleged that, in order to have the race to decide the wager, certain expenses were incurred for the use of the race-ground and for other expenses, for which the defendant was liable; and that on the day of the race, one hundred and fourteen dollars were collected as entrance fees, one fourth of which belonged to the defendant, and that said one fourth was paid to the plaintiff to pay such expenses, but the plaintiff did not pay them; and the defendant claimed to recoup so much of the money in his hands as stakeholder as should indemnify him for such expenses, together with what was required to pay the expenses, from the money in the plaintiff's hands. The defendant also filed a declaration in set-off for the money in the plaintiff's hands. The case was submitted to the superior court, and, after judgment for the plaintiff, to this court on appeal, on an agreed statement of facts in substance as follows:—

The defendant, prior to May 22, 1875, received of the plaintiff the sum of one hundred dollars, as a stakeholder on a wager between the plaintiff and one Woodward, upon the result of a horse race, which actually took place on May 22, 1875. This money was to be paid to the winner

of the bet, after the race. After the race, while the money was still in the hands of the defendant, the plaintiff, claiming that the race was not fairly had, and that the decision of the judges of the race was not fairly made, forbade the defendant paying the money to Woodward, and requested the defendant to pay the same to him, which the defendant refused to do. Afterwards the money still remaining in the defendant's hands, the plaintiff commenced this action. The defendant well knew of the wager, and knew that the deposit of money was made in aid of illegal trotting and horse racing; and at the time of the racing both the plaintiff and defendant were present, encouraging it.

The plaintiff received a certain amount of money as entrance fees at the race, and the expenses mentioned in the defendant's answer were to be paid therefrom, and the balance to four persons. If there should be any balance after the payment of such expenses, and the same, or any part thereof, could be legally set off in this action, an assessor was to be appointed to ascertain the balance of the defendant's share thereof, and the same was to be allowed him.

H. Winn, for the defendant.

S. T. Field, for the plaintiff, was not called upon.

GRAY, C. J. The wager was illegal, the winner had no right to the money, the stakeholder was a mere depository, and the plaintiff, having demanded the money before it was paid over, was not *in pari delicto*, and was entitled to recover his deposit from the stakeholder, whether it was still in his hands, or had been paid by him to the winner after notice from the plaintiff not to do so. The fact insisted upon at the argument, that the defendant knew of and promoted the illegal wager, affords him no protection. *White v. Franklin Bank*, 22 Pick. 181, 189; *McKee v. Manice*, 11 Cush. 357; *Love v. Harvey*, 114 Mass. 80; *Fisher v. Hildreth*, 117 Mass. 558.

The agreement as to the collection of entrance fees and the payment of expenses at the horse race, upon which the wager was laid, was wholly distinct from the wager, and cannot therefore be set up by way of recoupment in this action; and, being itself illegal (Gen. Sts. c. 167, § 9), will not sustain the defendant's declaration in set-off.

Judgment for the plaintiff affirmed.

NOTES OF NEW BOOKS.

McArthur's Reports, Vol. 2. JUDGE MCARTHUR's second volume of Reports of Decisions of the Supreme Court of the District of Columbia has been issued.

Messrs. BAKER, VOORHIS & Co., announce the following new works:—

Burroughs on the Law of Taxation: A Treatise which expounds the Law of Taxation in all its different aspects.

Bump's Annotated Patent, Copyright, and Trade-mark Laws: giving Notes of all the Judicial Decisions under each Section of the Law to the latest date. This work will be found to embrace a complete Digest of the Decisions under the Patent, Copyright, and Trade-mark Laws. By O. F. BUMP, Esq.

The New York Annotated Code: The New Code of Civil Procedure, with full Notes and References. The publishers say: We shall aim, with the assistance of the best legal ability and experience, to make our edition of the *New Annotated Code* the fullest and the best; and we believe it will be as indispensable to Courts and Lawyers as our previous editions of the old *Annotated Code* were for over a quarter of a century.

THE AMERICAN LAW TIMES.

NEW SERIES.—SEPTEMBER, 1877.—VOL. IV., No. 9.

DIGEST OF CASES

PUBLISHED IN EXTENSO IN LATE ISSUES OF AMERICAN LEGAL PERIODICALS.

ABBREVIATIONS.

Albany L. J. — *Albany Law Journal*, Albany, N. Y., WEED, PARSONS & Co.
Am. Law Rec. — *American Law Record*, Cincinnati, O., H. M. MOOS.
Am. Law Reg. — *American Law Register*, Philadelphia, Pa., D. B. CANFIELD & Co.
Cent. L. J. — *Central Law Journal*, St. Louis, Mo., SEYMOUR D. THOMPSON.
Chicago L. N. — *Chicago Legal News*, Chicago, Ill., CHICAGO LEGAL NEWS CO.
Ins. L. J. — *Insurance Law Journal*, New York, C. C. HINE, 176 Broadway.
Int. Rev. Rec. — *Internal Revenue Record*, New York, W. P. & F. C. CHURCH.
La. L. J. — *Louisiana Law Journal*, New Orleans, La.
Leg. Chron. — *Legal Chronicle*, Pottsville, Pa., SOL. FOSTER, JR.
Leg. Int. — *Legal Intelligencer*, Philadelphia, Pa., J. M. POWER WALLACE.
Mo. Jur. — *Monthly Jurist*, Bloomington, Ill., T. F. TIPTON.
N. B. R. — *National Bankruptcy Register*, New York, CAMPBELL & Co.
Pac. Law Rep. — *Pacific Law Reporter*, San Francisco, Cal., J. P. BOGARDUS.
Pittsb. L. J. — *Pittsburg Legal Journal*, Pittsburg, Pa., J. W. & J. S. MURRAY.
W. L. R. — *Washington Law Reporter*, Washington, D. C., JNO. L. GINCK.
W. N. C. — *Weekly Notes of Cases*, Philadelphia, KAY & BRO.
West. Jur. — *Western Jurist*, Des Moines, Iowa, MILLS & Co.

ADMIRALTY.

1. SEAMEN'S WAGES. — THE REMEDY GIVEN TO SEAMEN BY SECS. 4546 AND 4547 of the Rev. Stat., as preliminary to the filing of a libel for wages, is not exclusive, but cumulative, merely. A libel for seamen's wages may be filed, and process for the arrest of a vessel obtained, without resort to the preliminary proceedings authorized by sec. 4546, 4547. Those sections examined and construed in connection with sec. 6 of the Act of 1790 (vol. 1, Stat. at Large, ch. 29, p. 131). *Gibney v. The Steamer Waverly*, D. C. U. S. E. D. Wisc., Chicago L. N., July 28, 1877.

2. APPEAL FROM DISTRICT TO CIRCUIT COURT. — WITHIN WHAT TIME MAY BE TAKEN. — The provisions of sec. 635 Revised Statutes, relative to appeals within one year from the time of entering the judgment, order, or decree appealed from, does not apply to appeals from decrees in admiralty. Appeals in admiralty should be taken to the term of the circuit court next succeeding the term of the district court at which the decree

was rendered. *Drake v. Schooner Oriental*, C. C. U. S. No. D. Ohio, Chicago L. N., June 16, 1877.

See INSURANCE, 7.

BANKRUPTCY.

1. COMPOSITION. — ATTACHMENT IN STATE COURT. — An attachment in a state court, levied within four months of the commencement of involuntary proceedings, is not dissolved by a composition under the bankrupt law, without an adjudication and assignment. *In re Shields*, D. C. U. S. Iowa, 15 N. B. R. No. 12.

2. WHERE THE HOMESTEAD OF THE BANKRUPT HAS BEEN SOLD, pursuant to an order of the bankruptcy court, to satisfy a debt secured upon it by a deed of trust or mortgage, such court has jurisdiction to order the bankrupt to deliver up possession of the property to the purchaser. An agreement to extend the time of payment of a debt secured upon real estate by a mortgage or deed of trust need not be in writing. *In re Betts*, C. C. U. S. E. D. Mo., Ib.

3. CLAIM OF CREDITOR OMITTED FROM SCHEDULE. — Where notice has been duly given by publication, a discharge will bar the claim of a creditor whose name was omitted from the schedule, or was not furnished to the marshal, where such omission was not fraudulent. *Heard v. Arnold*, S. C. Ga., Ib.

4. A LIEN OBTAINED UNDER A JUDGMENT is not affected by proceedings in bankruptcy commenced thereafter. The fact that an appeal has been taken from the judgment does not alter the case, where no bonds have been executed by the appellant, as required by law. *In re Gold Mountain Mining Co.*, D. C. U. S. Cal., Ib.

5. HUSBAND AND WIFE. — WHERE A WIFE EXECUTES A MORTGAGE ON HER SEPARATE PROPERTY for the payment of the debts of her husband, who thereby receives a greater sum than he would be entitled to by the curtesy in the residue of the amount realized on a sale of the property under the mortgage after payment of the mortgage debt, the heirs or representatives of the deceased wife are entitled to the fund in preference to the assignees of the husband. *Shippen's App.*, S. C. Pa., Ib.

6. COMPOSITION. — ONE MEMBER OF A FIRM WHICH HAS BEEN ADJUDICATED BANKRUPT may submit a proposition of composition to the creditors of the firm and his individual creditors. *Pool v. McDonald*, C. C. U. S. N. D. Ohio, Ib.

7. PLEADING AND PRACTICE. — ALLEGATIONS TOUCHING SCIENTER. — In a suit in equity brought by the assignee to set aside a sale as fraudulent under sections 5128 and 5129, the bill must allege that the defendant *knew* that such sale was made in fraud of the provisions of the act, and such knowledge must be proved in the evidence taken in support of the bill. *Crump v. Chapman*, D. C. U. S. E. D. Va., Ib.

8. WAIVER OF DISCHARGE BY DEBTOR. — A debtor who has been discharged in bankruptcy may waive the discharge and allow a judgment to be recovered against him for the original debt. Where the debtor has waived his discharge as a defence, it cannot be raised by one who is in possession of property of the debtor, transferred with intent to defraud

creditors, in an action to set aside such transfer. *Dewey v. Moyer*, S. C. N. Y., 15 N. B. R. No. 16.

9. THE ASSIGNEE IS BUT A TRUSTEE FOR THE CREDITORS ; while he holds the property a creditor may bring an action to set aside a transfer by the bankrupt as fraudulent, if he makes the assignee a party ; if not, the defendant must set this up as a defect of parties. *Ib.*

10. UPON THE DISCHARGE OF THE ASSIGNEE the property remaining in his hands reverts to the debtor without reassignment. *Ib.*

11. PARTNERSHIP. — SALE OF INTERESTS OF PARTNERS. — PARTNERSHIP PROPERTY. — The sale on execution of either or both the partners' interest in the joint assets gives to the purchaser only an interest in such assets as may remain after the payment of the partnership debts. The fact that the interests of both partners were sold on separate executions to the same purchaser can have no effect to enlarge the interest of either partner acquired by such purchaser on the separate sale of such interest, nor to discharge the assets from liability for the partnership debts. Premises used by partners for the purpose of carrying on their business *prima facie* form part of the partnership property ; but this presumption may be rebutted. *Osborn v. McBride*, D. C. U. S. Cal., *Ib.*

12. PREFERENCE. — THE EXCHANGE OF A MORTGAGE FOR NOTES, in pursuance of a parol contract that such mortgage should be given when the creditor asked for it, is not a preference under the provisions of the bankrupt act, although made within four months before the commencement of bankruptcy proceedings. *Hewitt v. Northup*, S. C. N. Y., *Ib.*

13. JURISDICTION OF STATE COURT. — HABEAS CORPUS, ETC. — Where a decree operating as a lien upon defendant's estate has been obtained in a state court, and the defendant afterwards goes into bankruptcy, proceedings under a state statute will not lie before a state officer against defendant for discovery of his estate similar to those given by section 5086 of the Revised Statutes of the United States ; they must be taken in the bankruptcy court. Where such proceedings are taken before a state officer, and the bankrupt is imprisoned by him, he will be released on *habeas corpus* by a U. S. court, where the decree of the state court is not for a fiduciary debt of the bankrupt. *In re Taylor*, D. C. U. S. E. D. Va., *Ib.*

14. SECTION 5117 DOES NOT EMBRACE THE SURETY IN A GUARDIAN'S BOND among those not released by a discharge in bankruptcy. *Ib.*

15. UNDER THE LAWS OF VERMONT AN ATTACHMENT OF A DEBT BY TRUSTEE PROCESS creates a lien on the funds in the hands of the trustee after service upon him, although no notice is given to the principal debtor. Such lien is a lien by attachment by mesne process and will be saved when made the prescribed length of time before the commencement of the proceedings in bankruptcy. *In re Peck*, S. C. U. S. Vt., *Ib.*

16. THE FACT THAT PERSONS HAVE BEEN ADJUDICATED BANKRUPTS AS MEMBERS OF ONE FIRM is no bar to nor does it defeat a petition against them as partners with others in another firm. As to whether the individual property of such persons should go to pay the debts of the former or of the latter firm, *quære*. *In re Jewett & Co.*, C. C. U. S. W. D. Wisc., *Ib.*

BILLS AND NOTES.

WHAT CONSTITUTES NEGOTIABLE INSTRUMENT. — Defendants, the

maker and payee of an instrument in which the maker waived "any and all exceptions under and by virtue of any execution, exemption, homestead, or stay laws of the State of Missouri, or that of any other state," and in which he promised also "to pay a reasonable attorney's fee for the bringing of suit in collection of this note, if suit thereon be brought or collection thereof be enforced after the same shall become due," were sued as maker and indorser, respectively. *Held*: (1) that it was not a negotiable promissory note; (2) that the defendants were not jointly liable; (3) that the assignor could only be held liable in an action against him upon his implied undertaking to pay after due diligence used by the assignee in the institution and prosecution of suit against the maker for the recovery of the money due, or in the event of insolvency or non-residence of the maker, so that suit would be unavailing or could not be instituted. *Samstag v. Conly et al.* S. C. Mo., Cent. L. J., July 13, 1877.

COMMON CARRIER.

LIMITING LIABILITY.—NEGLIGENCE.—EXPRESS COMPANY.—Plaintiff delivered three bales of furs, worth seven thousand dollars, to the defendants at Chicago, for transportation to New York, taking a receipt therefor in which it was stipulated that the company should not be held for any loss or damage except as forwarders only, nor for any loss or damage of any box, package, or thing, for over fifty dollars, unless the just and true value thereof should be stated in the receipt. No value was stated in the receipt. The furs were lost through the failure of a railroad company, employed by defendant to carry them, to provide its cars with the most approved platform then in use. *Held*: (1) that, while the defendant could, by express contract, relieve itself of its liability as an insurer, it could not so relieve itself of its liability for its own negligence or that of a railroad company employed to carry its freight; (2) that the railroad company in question was guilty of negligence in not adopting and using the most approved platform then in use, and that defendant was liable for the value of the furs destroyed on account of such default; (3) that to avail itself of the limitation upon its liability contained in said receipt to any extent, the defendant must show *by the most satisfactory evidence* that the terms of the receipt were comprehended and assented to by the shipper. *Buskowitz v. Adams Ex. Co.*, S. C. Ill., Cent. L. J., July 20, 1877.

CONDEMNATION OF LAND.

See CONSTITUTIONAL LAW.

CONFLICT OF LAWS.

ORDER FOR GOODS ILLICIT IN MICHIGAN TAKEN BY CITIZEN OF OHIO WHERE GOODS NOT ILLICIT.—LEX LOCI.—Where A., a resident of Michigan, gives an order in that state to B., a citizen and resident of Ohio, for the purchase of liquors, and B. accepts it in Michigan, it is a contract made in Michigan, and void under the liquor law of that state. Had B. been a mere agent, without authority to sell, but merely to take orders for transmission to Ohio for acceptance there, the contract might have been sustained as an Ohio contract. The fact that the contract was

not a completed sale until the liquor should be actually set apart from the vendor's stock, and that that act was to be done in Ohio, will not prevent it from falling within the prohibition of the Michigan law against all "contracts relating to liquors," &c. Even though the order would have been void under the statute of frauds for want of writing, and, therefore, without effect until acted upon by the delivery of the goods to a carrier in Ohio, it is nevertheless a Michigan contract; for if the order was void there was nothing to bind the purchaser till his acceptance of the goods when delivered in Michigan. *Webber v. Howe*, S. C. Mich., Am. Law Reg., July, 1877.

CONSTITUTIONAL LAW.

1. CONDEMNATION OF LAND FOR RAILROAD. — PAYMENT. — INJUNCTION. — Where land has been condemned for railroad purposes, commissioners appointed, damages assessed, &c., the right of the land-owner to payment for his property, as a constitutional condition precedent to the transfer of the title to the land taken, exists in all its original vigor. Where the corporation is insolvent and the damages are not paid, it is the right and duty of the trial court to issue an injunction restraining the corporation from operating its cars over the land until the owner shall have been paid the assessed damages, and there is no vested right in the corporation, and no doctrine of public policy or convenience, which can absolve a court of equity from this duty. *Evans v. Mo., Iowa & Neb. R. Co.*, S. C. Mo., Cent. L. J., July 13, 1877.

2. PRESUMPTION. — EVIDENCE OF WAIVER. — Courts of equity, in such cases, will indulge in no presumption that the land-owner has waived or postponed his right to insist on payment of the damages, and will insist on, at least, as conclusive evidence of alleged waiver, as is required in cases of vendor's lien, the condemnation and seizure of the land being a statutory proceeding *in invitum*. *Ib.*

See DIVORCE 2.

COVENANT.

COVENANT NOT TO BUILD. — DOES NOT RUN IN FAVOR OF OWNER OF ADJOINING LOT. — Where a personal covenant is made by a tenant not to build without the landlord's approval, a subsequent lessee of the same landlord of an adjoining plot cannot compel the landlord to enforce for his benefit the covenant with the first tenant. *Master v. Hansard*, Ct. App. Ch., English, Am. Law Reg., July, 1877.

CRIMINAL LAW.

1. MURDER. — EVIDENCE. — USE OF DEADLY WEAPON. — PRESUMPTIONS. — FLIGHT, &c. — The burden of proving murder in the first degree lies on the commonwealth, but it is not necessary that the evidence should be express; it is sufficient if, from the nature and use of the weapon and the acts and conduct of the prisoner, his intention to kill can be fully, fairly, and justly inferred, with so much time for deliberation as to convince that his purpose was *culpable* and premeditated. The fact of murder being established, the inability to discover a motive does not dis-

prove the crime. The use of a deadly weapon, such as a pistol, when voluntarily directed against a mortal part, is evidence from which a jury may rationally infer an intention to kill when the conduct of the prisoner, and the circumstances under which he fires the fatal shot, corroborate and sustain the inference. *Lanahan v. The Commonwealth*, S. C. Pa., W. N. C., July 19, 1877.

2. L., having met R. at a political meeting, offered him a seat home in his wagon. R. accepted the invitation, and the two started, about dusk in the evening. When the wagon had proceeded about 200 yards, two shots in quick succession were heard, and the horse was whipped up; the vehicle finally collided with another, and stopped. Near it was found R.'s dead body shot through the heart. L. fled and was captured about a year afterwards, when it was found that he also had been wounded. The position of the men in the wagon, the nature of their respective wounds, and the other evidence in the case tended strongly to prove that the shot which wounded L. was fired from his own pistol. There was no evidence of any quarrel between the men, or of any motive for the commission of the crime. *Held*, that the jury were justified, in view of all the circumstances, in finding a verdict of murder in the first degree. *Ib.*

DIVORCE.

1. A DIVORCE GRANTED BY A COURT OF UTAH TERRITORY in a suit between two persons, neither of whom was, at the time of the proceedings, a resident of Utah or within the boundaries of the territory, but both of whom were residents and citizens of a state in the Union, is void for want of jurisdiction. *Hood v. The State*, S. C. Ind., Cent. L. J., July 13, 1877.

2. THE CLAUSE OF THE UNITED STATES CONSTITUTION which provides that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state," does not include judgments and decrees which show upon their face that the court rendering them had no jurisdiction. *Ib.*

3. FORNICATION AND ADULTERY DEFINED. — Fornication is sexual intercourse between a man married or single and an unmarried woman. Adultery is sexual connection between a married woman and an unmarried man or a married man other than her own husband. *Ib.*

EVIDENCE.

See CONSTITUTIONAL LAW, 2; CRIMINAL LAW; MARRIAGE.

EXPRESS COMPANY.

See COMMON CARRIER.

HABEAS CORPUS.

See BANKRUPTCY, 13.

HUSBAND AND WIFE.

See BANKRUPTCY, 5.

INJUNCTION.

See CONSTITUTIONAL LAW; TAXATION.

INSURANCE.

1. FAILURE TO PAY PREMIUM NOTE. — FORFEITURE. — WAIVER. — RIGHTS OF INSURED, ETC. — A policy of life insurance contained the usual clause of forfeiture for non-payment of premiums. Departing from the strict rules of the company, a duly authorized agent had allowed the cash part of the premiums to be paid one half cash, and the other half by a short note. Upon the 6th of July, 1867, the day the premium was due the agent received the check of assured for the half cash due, and a six months' note; giving the renewal receipt for a year. The note contained the clause: "If not paid at maturity, said policy is to be null and void." Neither check nor note was paid. *Held*, that the mere fact that the note was not paid at maturity did not of itself avoid the policy. It gave the insurance company the option of declaring a forfeiture; but this option must be asserted by clear and unequivocal acts. The clause of forfeiture being inserted in the note for the benefit of the company, may be waived by failure to act, or other circumstances evincing an intention not to claim the benefit of the stipulation. Whether the company has exercised such option, or waived their rights, is a question of fact for the jury, under all the circumstances of the case. *Held, also*, that the assured is entitled to a renewal upon tendering, at the proper time, the amount of premium due. This amount does not include interest on premium notes previously given, where the policy does not provide for its forfeiture by reason of non-payment of such interest. *Mutual Benefit Life Ins. Co. v. French*, S. C. Ohio, Ins. L. J., July, 1877.

2. AGENCY. — AGREEMENT OF AGENT WHERE NO COMPANY IS SPECIFIED. — WAIVER BY AGENT. — Application for insurance was made to the general agent of the H. Company on the street, who agreed to issue a policy and extend the time of payment. Nothing was said about any particular company, which was left to the agent's discretion. The agent returned to his office and filled up and delivered a policy in the H. Company. *Held*, that he acted as agent of the company, and not of the insured, and that the agreement to extend the time of payment was a waiver of the policy condition that it should not be binding until payment of premium; the fact that the agent failed to indorse such waiver upon the policy, as required by another provision, did not prevent a recovery. *Young v. Hartford Fire Ins. Co.*, S. C. Iowa, *Ib.*

3. OBJECTIONS TO THE SUFFICIENCY OF PROOFS OF LOSS furnished by the insured should be made by the insurer with reasonable promptitude, that they may be perfected if possible. Where the proofs were accepted on the 12th of June, and no objection to their sufficiency was made until the 21st of August following: *Held*, that the objections were made too late. *Ib.*

4. DESCRIPTION OF TITLE. — WHERE THE AGENTS KNEW THE CONDITION of the title, and filled up the statements in the policy on their own responsibility, the company cannot allege that the title was not accurately described. *Ib.*

5. PLEADING. — MULTIFARIOUSNESS. — FAILURE TO ALLEGE INABILITY TO PROVE CONTENTS OF INACCESSIBLE POLICY. — SPECIFIC PERFORMANCE. — A bill in equity which seeks the discovery and production of the application and policy, to enable the plaintiff to maintain a suit at law, and also the specific performance of an alleged agreement to deliver the policy, and a decree for the delivery, is bad for multifariousness. An allegation simply that plaintiff is advised she cannot safely proceed in a suit of law without the delivery of the policy, and the defendants refuse such delivery, but not alleging any inability to prove the contents, or have them produced in the court of law, cannot be maintained. A bill for specific performance of an agreement to deliver a policy, where more than ten years have elapsed, cannot be maintained in an equity court. *Markey v. Mut. Benefit Fire Ins. Co.*, C. C. U. S. Mass., *Ib.*

6. THE UNDERWRITER OF A SHIP MAY MAINTAIN A SUIT IN ADMIRALTY FOR THE PREMIUM upon a strictly marine policy, and is entitled to a lien upon the vessel for the payment. *Orient Mut. Ins. Co. v. Dolphin*,¹ C. C. U. S. E. D. Mich., *Ib.*

7. *IBID.* — THE LIBEL OR PETITION SHOULD AVER not only the dates and amounts of the policies, but the names of the parties insured, and the character and extent of their several interests in the vessel. *Ib.*

8. DESCRIPTION TAKEN FROM POLICY OF ANOTHER COMPANY. — KNOWLEDGE OF AGENT OF ERRONEOUS DESCRIPTION. — The general agent filled up the policy from a description taken from the policy of another company, which did not state that the building stood on leased ground. The fact, however, was known to the agent. *Held*, that the company was estopped from alleging in defence a policy condition requiring the fact to be stated in the policy, and that the failure to state the existence of an incumbrance was not a violation of the policy condition, that if the title be other than that of entire, unconditional, and sole ownership, it must be stated. *Manhattan Fire Ins. Co. v. Weill*, Ct. App. Va., *Ib.*

9. SUICIDE. — WHEN INTENT IS A QUESTION FOR THE JURY. — In an action on a policy of insurance, the defence being suicide, the evidence disclosed that deceased had shortly before his death spoken to his wife and an employee in his usual manner, after which he went up stairs, changed

¹ The following is the full text of Judge SWAYNE's opinion, affirming that of Judge BROWN: —

"I have listened with great attention to the arguments submitted by counsel upon both sides of this case, and I have since read with care the opinion of my learned brother, the district judge. It is careful, able, learned, and well considered.

"The profession and the courts are very much at sea as to many questions touching liens upon admiralty. Different district and circuit judges and judges of the supreme court on the circuits are constantly deciding the same questions differently, all over the country, where such questions arise. It has been expected confidently that Congress would interpose, and by a law remedy all such doubts and difficulties. This has not yet been done, but it is hoped that it will be

done at an early day. My first impulse was to take this case home with me and prepare an elaborate opinion, but reflection has brought me to a different conclusion. In such an opinion my brethren of the supreme court might not concur, and I have thought it best therefore to keep my mind, as far as it might be consistent with the performance of my duties, uninfluenced by the consideration of such cases, except as they may come before the full court. As regards this case, there are two obstacles in the way to a different conclusion than has been reached already. I should have decided the case in the same way, and, as at present advised, I am willing to indorse and stand by Judge Brown's opinion. I am not prepared to say that he has committed any error; I think he has not. The decree of the district court is affirmed."

— EDITOR.

his dress somewhat, and was subsequently found by his wife lying on the bed with an empty pistol and a loaded one by his side, the bullet from the former having entered his head back of the ear, causing death. The physician called in at the time testified that the pistol must have been held against his head. There was no eye-witness to the death. *Held*, that under the circumstances the question of whether or not the deceased had committed suicide was properly left to the jury. *Shank v. United Brethren, &c. Soc.*, S. C. Pa., W. N. C., August 2, 1877.

LEX LOCI.

See CONFLICT OF LAWS.

LIMITATIONS.

WHEN EQUITY WILL DISREGARD. — MINING TRESPASS NOT DISCOVERABLE TILL AFTER EXPIRATION OF PERIOD FIXED BY STATUTE. — *ULTRA VIRES*. — RELEASE, ETC. — Equity follows the law in refusing relief, where time has elapsed which at law would have barred the claim. But where the statute is sought to be used against good conscience and the plaintiff has not been guilty of laches, equity will remove the legal bar arising from lapse of time. Where therefore a legal fraud has been committed (in this case a trespass upon the plaintiff's coal mines by an adjoining owner, more than six years before the bill was filed), but which was not discovered or discoverable by the plaintiff until a reasonable time (some two years) before the bill was filed, the statute of limitations is not a good defence. The working of mines by the defendant's predecessor in title, a railway company, was admittedly *ultra vires*, and possibly this would have been a defence to the defendant, a company with which the first was subsequently amalgamated, for trespasses committed by the first company, in mining coal, by trespassing upon the plaintiff's adjoining mines. An act of parliament was passed, when the wrongful acts were in course of commission, by which the trespassing company was authorized to sell their mines within five years. *Held*, that the act of mining, though originally unlawful, was impliedly recognized and ratified by the permission in the act of parliament to sell the mines, and that the defendant was therefore liable for its predecessor's trespasses committed in the course of an act (mining) originally *ultra vires*. Wrongful acts (in this case of trespass) are not condoned by a subsequent general release, where the party injured has no ground for suspecting the particular wrongful acts complained of, and the release was by him intended to operate upon a different subject matter. *Ecclesiastical Commissioners v. N. E. Railway Co.*, Vice Chan. Ct., English, Am. Law Reg., July, 1877.

MARRIAGE.

1. IMPEDIMENTS TO MARRIAGE. — AGE OF CONSENT. — A Michigan statute (2 Comp. L. S. 4729) makes it a misdemeanor to solemnize a marriage without authority to do so, or with knowledge of legal impediments thereto. *Held*, to apply where the girl is under the age of consent. *Bouker v. The People*, S. C. Mich., Cent. L. J., July 13, 1877.

2. ILLEGAL MARRIAGE. — EVIDENCE. — Where a justice joined in

marriage a girl who was under the age of consent, it was held competent to show that his family and her father's were acquainted, and that at the marriage he did not inquire for her parents, who were not present; these facts tended to show that he knew the marriage was unlawful. *Ib.*

3. SUPPRESSION OF TESTIMONY BY PROSECUTION. — The rule requiring the prosecution to call every attainable witness where testimony is needed to disclose any part of the transaction, is to prevent the suppression of evidence, and does not make it necessary to call all the witnesses, particularly when their evidence would be only cumulative. *Ib.*

4. PROOF OF GUILTY KNOWLEDGE. — When guilty knowledge is an ingredient of the offence, there need not usually be direct proof of actual, positive knowledge, but the jury may infer it from suspicious circumstances, such as apparently intentional neglect to make inquiry before taking part in a transaction. *Ib.*

MISREPRESENTATION.

MISREPRESENTATION AND MISTAKE OF LAW. — RAILROAD. — STOCK. — The L. Railway Company was authorized by its acts of incorporation to issue £190,000 preference shares and a large amount of ordinary shares. In 1864 it was amalgamated by act of parliament with the Cambrian Company, up to which time it had issued £85,000 preference shares, which ranked as No. 1 preference stock, and £60,000 ordinary shares, which ranked as No. 2 preference stock, and power was reserved to the Cambria Company, to raise any capital which either of the amalgamated companies had power to raise prior to the amalgamation. The directors of the amalgamated company, under a *bonâ fide* belief that they were authorized to raise £15,000 additional preference shares of the L. Company, and to make them rank with the £85,000 No. 1 preference stock, issued £15,000 shares of preference stock, and described them as No. 1 preference stock in the certificates, which were signed by the directors and the secretary, and which were handed to the plaintiff at the time he purchased some of the stock. It was subsequently decided that the new stock was not No. 1 preference stock, but ranked below it. *Held*, that the purchaser had not been deceived by any misrepresentation of fact, and his bill was dismissed. *Eaglesfield v. Marquis of Londonderry*, Ct. App. in Ch., English, Am. Law Reg., July, 1877.

MORTGAGE.

See BANKRUPTCY, 5.

MUNICIPAL CORPORATION.

AUTHORITY TO SUBSCRIBE NOT AUTHORITY TO SELL. — A county, under legislative authority, having voted to subscribe \$250,000 to the stock of a railroad company, and the legislation permitting bonds to be issued for the amount so subscribed, the county court issued bonds and sold them at a large discount, until enough were sold to pay the \$250,000. *Held*, that the county board exceeded its powers in issuing bonds to a larger amount than the sum subscribed. *Davies Co. Court v. Howard*, Ct. App. Ky., Am. Law Reg., July, 1877.

NATIONAL BANK.

1. A RESOLUTION TO GO INTO LIQUIDATION, together with a certificate of discharge from liability for circulating notes, does not operate to dissolve a national bank so that no judgment can be rendered against it. *Ordway v. Central Nat'l Bank of Balto.*, Ct. App. Md., Cent. L. J., July 27, 1877.

2. A STATE COURT MAY ENTERTAIN AN ACTION OF DEBT AGAINST A NATIONAL BANK to recover double the amount of interest unlawfully taken by it. *Id.*

3. PENALTIES. — JURISDICTION OF FEDERAL COURTS. — The penalties and forfeitures, of which exclusive jurisdiction is given to the federal courts by section 711 of the Revised Statutes, contemplates only those penalties and forfeitures of a public nature which may be sued for by the government or some person in its behalf. *Id.*

NEGLIGENCE.

INJURY TO LOOKER-ON. — A railroad company is not liable for an injury to a person resulting from its failure to exercise ordinary skill and care in the erection or maintenance of its station-house, where, at the time of receiving the injury, such person was at such station-house by mere permission and sufferance, and not for the purpose of transacting any business with the company or its agents, or on any business connected with the operation of the road. *Pittsburg, Ft. W. & C. R. W. Co. v. Bingham*, S. C. Ohio, Cent. L. J., July 27, 1877.

See COMMON CARRIER.

PARTNERSHIP.

See BANKRUPTCY, 11, 16.

PLEADING AND PRACTICE.

See ADMIRALTY, 2; BANKRUPTCY, 7; INSURANCE, 5.

RAILROAD.

DIRECTION OF TRUSTEE BY COURT. — REMEDY OF BONDHOLDERS, ETC. — Where a decree of foreclosure under a deed of trust conveying a railroad, &c., to secure certain bonds, has been obtained in the name of the trustee for all the bondholders, a court of equity will not, at the instance of certain bondholders, direct the trustee to execute the decree and sell the road at once; but will leave the trustee to the exercise of his discretion. The remedy of the bondholders in such case is to apply to have the trustee removed, and in that way get a trustee who will execute their wishes. *Farmers' Loan & Trust Co. v. Central R. R. of Iowa*, C. C. U. S. Iowa, West. Jur., July, 1877.

See CONSTITUTIONAL LAW; MISREPRESENTATION.

REMOVAL OF CAUSES.

1. WHEN JURISDICTION OF STATE COURT DETERMINES. — The defendant filed its application and bond for the removal of the cause from the state to the federal court. After approving the bond, the state court permitted the plaintiff to enter a nonsuit. *Held*, that after the filing of the proper application and bond the state court could proceed no further in the cause, and that any attempt in that direction was *coram non judice*; and that, consequently, the nonsuit was improperly granted. *Berry v. Chicago, R. I. & Pac. R. R. Co.*, S. C. Mo., Cent. L. J., July 13, 1877.

2. THE ACT OF CONGRESS OF 1866 (U. S. Rev. Stat. § 643), providing for the removal of criminal proceedings against a United States revenue officer where the offence complained of is alleged to have been committed under color of his office, is constitutional. *State v. Hoskins*, S. C. No. Ca., Albany L. J., August 4, 1877.

3. WHEN MOTION SHOULD BE MADE. — NATIONAL BANK. — An action in equity against a national bank was brought in a state court, an answer was filed, the bill was dismissed, an appeal was taken, the decision dismissing the bill reversed, and the cause remanded. The cause was then redocketed, whereupon defendant moved for its transfer to the United States circuit court, under the Act of March 3, 1875. *Held*: (1) that the motion to remove was in apt time; but (2) that the fact that defendant was a national bank furnished no reason for removal. *Petillon v. Noble*, C. C. U. S. No. D. Ill., Albany L. J., June 18, 1877.

4. ACT OF MARCH 3, 1875. — CITIZENSHIP. — Plaintiff, a citizen of Colorado, brought a stockholder's bill in a state court, in Colorado, making defendants thereto the railroad company (also a citizen of Colorado), in which the plaintiff was a stockholder, namely, the Denver Pacific Railway Company, and also the directors thereof, including two directors, citizens of Colorado, against whom, however, no charges were made, and no relief asked; also making a defendant another railroad company, namely, the Kansas Pacific Railway Company (a citizen of Kansas), and certain individuals, all citizens of other states than Colorado. The object of the bill was to secure an account in favor of the Denver Pacific Company against the Kansas Pacific Company, and to secure a decree *in personam* against the non-resident directors of the Denver Pacific Company. The Kansas Pacific Company and the individual defendants connected with that company, without being joined with the other defendant, applied to remove the suit to the circuit court of the United States, under the Act of March 3, 1875. *Held*, that the suit was removable. *Co. Com. of Arapahoe Co. v. Kansas Pac. R. W. Co.*, C. C. U. S. Col., Chicago L. N., July 28, 1877; Cent. L. J., August 3, 1877.

5. *IBID.* — THE RIGHT OF REMOVAL cannot be defeated by the joinder as defendants of citizens of the same state with the plaintiff, if no relief is prayed against them, and they are made defendants without any right or reason or just cause. *Ib.*

6. *IBID.* — IN A STOCKHOLDER'S BILL of the kind before the court, the company in which the plaintiffs are stockholders is a necessary party defendant, but the interest of the stockholders and the company are identical, and they represent one side of the controversy, and the company

against whom the accounting and relief are sought represent the other. *Ib.*

7. *IBID.* — WHAT MUST BE REMOVED. — The removal Act of March 3, 1875, provides that the suit — the whole suit, and not a part of the suit — shall be removed; and under that act, if the requisite conditions exist, any one of the plaintiffs or defendants may remove the suit and carry the other parties with them. *Ib.*

TAXATION.

INJUNCTION TO RESTRAIN TAX TO PAY INTEREST ON VOID BONDS. — On a bill filed by tax-payers to enjoin the levy of a tax to pay interest on the bonds issued in excess of \$250,000, it appeared that the bonds were all sold to the railroad company in whose aid they were voted, and consequently with full knowledge on the part of its officers of all the facts. *Held*, that the relief prayed for should be granted, as the bonds in excess of the sum permitted were nullities in the hands of the company. *Davies Co. Court v. Howard*, Ct. App. Ky., Am. Law Reg., July, 1877.

TRADE-MARK.

NAME OF SPRING PROTECTED. — The plaintiff owned a certain spring the water of which had acquired celebrity under the name of "BETHESDA." The defendant, who owned a spring the waters of which were the same as plaintiff's, used the designation "GLEN BETHESDA WATER." *Held*, that plaintiff was entitled to an injunction restraining defendant from any use of the word "BETHESDA." *Dunbar v. Glenn*, S. C. Wisc., Chicago L. N., August 4, 1877.

TRUST.

ACTIVE AND EXECUTED TRUST. — WHAT DISPOSITION OF ESTATE WILL SUPPORT TRUST. — TRUST FOR LIFE AND FOR COVERTURE DISTINGUISHED. — RULE IN *SHELLEY'S CASE*, ETC. — Upon a devise of the *corpus* of an estate to trustees, if the *cestui que trust* is given an estate for life only, or if the will clearly shows a purpose on the part of the testator to preserve the estate intact during the life of the *cestui que trust*, and secure its passage to those who would be entitled to it upon the death of the *cestui que trust*, the trust will be supported even though the *cestui que trust* be *sui juris*. But, where under the operation of the rule in *Shelley's case* the *cestui que trust* would take an estate in fee simple, and the only apparent purpose of the testator is the protection of the estate during coverture, the trust will cease if the *cestui que trust* afterwards becomes discoverd.

A testator gave the entire *corpus* of an estate to trustees, with active duties to lease the realty and put out the personalty upon real security, and to collect the rents and income, and pay the same to the *cestui que trust* for life, and so that it should not be liable to the control or debts of her husband, with power of appointment by will, and for want of such appointment, "then in trust, after the decease of her, my said daughter, to and for the only proper use and behoof of all and every child or children which she may leave, and the lawful issue of any of them who may

then be deceased having left such issue, their several and respective heirs, executors, administrators, and assigns," . . . followed by a provision that, in case the *cestui que trust* should die without leaving any child or children or the issue of deceased child or children, the estate should go to the right heirs of the said *cestui que trust*: *Held*, to create an active trust in the trustee for the life of the *cestui que trust*, with remainder of the legal estate in fee to her children as purchasers.

Another testator devised and bequeathed an estate to trustees, to lease the real estate, to invest the personalty in specified securities, and to collect and pay over the rents and proceeds to the same *cestui que trust* for her sole and separate use during her life, so as not to be subject to the debts or control of any husband; and upon her decease to transfer the *corpus* of the estate to such persons and in such manner as she may appoint by will; and in default of such will or appointment, to those entitled under the intestate laws of Pennsylvania to take the same, if she had died seised thereof in fee; also giving powers of sale to the trustees with consent of the *cestui que trust*: *Held*, that as the only apparent purpose of the trust was the protection of the estate during coverture, the trust ceased upon the *cestui que trust* becoming discoverd, and she therefore took a legal life estate, with remainder to her heirs in fee, which, under the rule in *Shelley's case*, vested in her a legal estate in fee. *Williams' Appeals*, S. C. Pa., W. N. C., July 19, 1877.

See TRUST FUND.

TRUST FUND.

A TRUST FUND MAY BE FOLLOWED INTO AND OUT OF A DEPOSIT IN A BANK, of which it has formed a part, and thence into the hands of a receiver for creditors of the partners who were the trustees; and the *cestui que trust* may recover it in equity from the receiver. *Brochus v. Morgan*, S. C. Tenn., Cent. L. J., July 20, 1877.

ULTRA VIRES.

See LIMITATIONS.

WILL.

CONSTRUCTION.—CONTINGENT REMAINDER.—VENDOR AND VENDEE.—MARKETABLE TITLE.—POSSIBILITY OF ISSUE.—A possibility of issue is always supposed to exist in law, even though the parties have passed the age to which the ability to bear children usually continues.

Testator devised land "to my daughter S., to be held by her husband, whom I hereby appoint trustee, in trust for her children." By a codicil he provided: "The devise to my daughter S. and to her children is intended and shall give to her children living at her death, and to the lawful issue of any of them if dead, in right of such one deceased, and to their heirs forever, share and share alike" the said land, "and for want of such issue living then that the real estate so devised to my daughter S. shall go to and vest in her husband during his natural life, for his own use and benefit, subject to the trusts in the said clause mentioned." S. had four

children, two born before the date of the will, and two after such date. One of the former and one of the latter died without issue. After S. had arrived at the age of seventy-five years she and her husband (also over seventy-five years of age), together with their two surviving children, who were *sui juris*, contracted to sell the land. In an action against the purchaser to enforce the contract: *Held*, that S. took an estate for life with a contingent remainder to such of her children or their issue as should be living at her death; that the purchaser's title would therefore be subject to be impaired either by the death of any of S.'s children leaving issue during the life of their mother, or by the birth of other children to S., and that the title was therefore not such a marketable one as a chancellor would compel a purchaser to take. *List v. Rodney*, S. C. Pa., W. N. C., August 2, 1877.

See TRUST.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

(To appear in 121 Mass.)

ATTORNEY AND CLIENT. — COMPENSATION OF ATTORNEY.

PIERCE v. PARKER.

An attorney at law, under a charge of commissions on money collected, may recover a fair compensation for services rendered, not included in his specific charges, although the client personally makes the collection; and the time of making such charge is immaterial.

MORTON, J. This is an action of contract, brought by an attorney at law, to recover for his services and disbursements in suits brought by the defendants against certain insurance companies. The only item of the plaintiff's account which was disputed was the fifty-fourth item, being a charge of \$350 for commissions on the amount collected of the insurance companies. It appeared at the trial that the defendants personally collected this amount of the insurance companies, and that it did not pass through the hands of the plaintiff, and that the charge of \$350 for commissions was made by the plaintiff after the money was thus collected.

In regard to this item, the defendants requested the court to instruct the jury, "that the plaintiff could not recover any sum upon this item in the account annexed, because the relation of counsel and client had been terminated before the charge was made, and because the collection was not made in fact by the plaintiff." The court rightly refused to give this instruction. The question whether the plaintiff was entitled to recover the whole or any part of this item does not depend upon the time when he made the charge in his books, nor upon the fact that the collection was not made by him.

In the case of an attorney at law, or other agent, acting for his principal in complicated affairs, it is manifestly inconvenient, if not impracticable, for the agent to make a specific charge for every item of service rendered by him for his principal. Although he makes specific charges for the more prominent and important services rendered by him, yet if, in the course of his agency, he performs other services not included in such charges, it is not unreasonable nor unjust that he should recover for such other services by a charge for commissions, or in some other general form, if his labors result in the collection of money by his principal.

In a case like the one at bar, an attorney at law cannot charge a commission as a fixed and arbitrary standard of compensation, but under such a charge he may recover a fair compensation for services rendered which have not been included in specific charges made by him. The time when he makes his charge is immaterial, and the fact that the client personally receives the money collected cannot deprive the attorney of his right to a reasonable compensation for all his services rendered while the agency continued.

The rulings of the court at the trial were in accordance with these principles, and were correct. *Exceptions overruled.*

A. Russ, for the defendants.

W. Gaston, for the plaintiff.

NOTES OF NEW BOOKS.

Judgments against Bankrupts. By A. C. FREEMAN. The Publishers of the *Central Law Journal* announce a new and enlarged edition of this excellent dissertation.

A Treatise on the Law Relating to the Office and Duties of Notaries Public throughout the United States, with Forms of Affidavits, Acknowledgments, Conveyances, Depositions, Protests, and Legal Instruments. By JOHN PROFFATT, LL. B. San Francisco: SUMNER WHITNEY & COMPANY; New York: HURD & HOUGHTON, — Riverside Press.

Messrs. COCKCROFT & Co. of New York and Chicago will have ready in a few weeks *An Unabridged Table of Cases*, giving the name, volume of reports, and page of every reported case contained in the Federal, State, and Territorial Courts, and in addition showing wherever it has been subsequently cited from the earliest case to January 1, 1877.

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The Civil Remedy for Injuries arising from the Sale or Gift of Intoxicating Liquors. By JOHN D. LAWSON. Published by *Central Law Journal Company* of St. Louis. A pamphlet of over fifty pages, containing the civil damage laws of Maine, Connecticut, Indiana, New Hampshire, Illinois, Iowa, Kansas, Michigan, New York, Ohio, and Wisconsin, together with all the adjudications which have been made under these acts.

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ABBREVIATIONS.

Albany L. J. — *Albany Law Journal*, Albany, N. Y., WEED, PARSONS & CO.
Am. Law Rec. — *American Law Record*, Cincinnati, O., H. M. MOOS.
Am. Law Reg. — *American Law Register*, Philadelphia, Pa., D. B. CANFIELD & CO.
Cent. L. J. — *Central Law Journal*, St. Louis, Mo., SEYMOUR D. THOMPSON.
Chicago L. N. — *Chicago Legal News*, Chicago, Ill., CHICAGO LEGAL NEWS CO.
Ins. L. J. — *Insurance Law Journal*, New York, C. C. HINE, 176 Broadway.
Int. Rev. Rec. — *Internal Revenue Record*, New York, W. P. & F. C. CHURCH.
La. L. J. — *Louisiana Law Journal*, New Orleans, La.
Leg. Chron. — *Legal Chronicle*, Pottsville, Pa., SOL. FOSTER, JR.
Leg. Int. — *Legal Intelligencer*, Philadelphia, Pa., J. M. POWER WALLACE.
Mo. Jur. — *Monthly Jurist*, Bloomington, Ill., T. F. TIPTON.
N. B. R. — *National Bankruptcy Register*, New York, CAMPBELL & CO.
Pac. Law Rep. — *Pacific Law Reporter*, San Francisco, Cal., J. P. BOGARDUS.
Pittsb. L. J. — *Pittsburg Legal Journal*, Pittsburg, Pa., J. W. & J. S. MURRAY.
W. L. R. — *Washington Law Reporter*, Washington, D. C., JNO. L. GINCK.
W. N. C. — *Weekly Notes of Cases*, Philadelphia, KAY & BRO.
West. Jur. — *Western Jurist*, Des Moines, Iowa, MILLS & CO.

ATTACHMENT.

THE UNITED STATES, WHEN A PLAINTIFF IN A CIVIL ACTION, is entitled to the writ of attachment, and is relieved by section 1001, Revised Statutes, from giving the usual undertaking. *United States v. Ottman*, S. C. D. C., W. L. R., July 30, 1877.

See BANKRUPTCY, 4.

BANKRUPTCY.

1. INTEREST. — WHERE THE ASSIGNEE HAS SOLD REAL ESTATE DISCHARGED OF LIENS, he should allow interest on the liens to the date of making up his report of distribution. *In re Devore*, D. C. U. S. W. D. Pa., 16 N. B. R. No. 2.

2. ATTORNEY'S COMMISSIONS AND COSTS stipulated to be paid on fore-
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closure are not allowable when the proceedings to foreclose are invalid. *Ib.*

3. JURISDICTION. — WHEN THE BANKRUPT COURT HAS FIRST TAKEN jurisdiction by ordering a sale of mortgaged premises, discharged of liens, it thereby ousts a state court of jurisdiction to foreclose the mortgage. *Ib.*

4. ATTACHMENT. — AN ASSIGNMENT TO AN ASSIGNEE duly appointed in the bankruptcy proceedings dissolves the lien of an attachment levied within four months prior to the filing of the petition. *Duffield v. Horton*, S. C. N. Y., *Ib.*

5. PAYMENT BY MISTAKE TO SHERIFF. — A debtor of the bankrupt, who has, in ignorance of the appointment of an assignee, paid the amount of his indebtedness to the sheriff under an execution in the attachment suit, is not thereby relieved from his liability to the assignee. *Ib.*

6. SET-OFF. — A VOLUNTARY ASSIGNEE is a mere representative of his assignor, and takes his choses in action subject to any existing right of set-off. Where a bank has made a voluntary assignment for the benefit of creditors, a depositor may set off a balance of deposits due him against his note held by the bank at the time of the assignment. *City Bank of Harrisburg v. Sherlock*, S. C. Pa., *Ib.*

7. PROCURING ENTRY OF JUDGMENT. — Where one of the members of an insolvent firm, with knowledge of such insolvency, carries a message at the request of a creditor, although unwillingly, to an attorney, directing him to enter up judgment upon a judgment note which the firm had previously given, *held*, that he thereby *procured* the entry of such judgment and the issuing of the execution thereon. *In re Benton*, C. C. U. S. E. D. Pa., *Ib.*

8. JURISDICTION. — UNDER THE AMENDATORY Act of June 22, 1874, the federal courts have exclusive jurisdiction over actions brought by assignees to recover property claimed to have been transferred by a bankrupt in violation of section 5128, where the value of such property exceeds five hundred dollars. The state courts were thereby ousted of their jurisdiction over such actions pending before them at the time of its passage. *Olcott v. Maclean*, S. C. N. Y., *Ib.*

9. A DISCHARGE IN BANKRUPTCY CANNOT BE SET UP AS A GENERAL DEFENCE to an action by a creditor to set aside a conveyance in fraud of creditors pending at the time of filing the petition, where such creditor has not proved his claim in the bankruptcy proceedings, and the assignee has not interfered in the cause in any way. But the discharge may be set up in such action in bar of a personal judgment against the bankrupt other than the subjection of the property and claims reached by the creditor's bill to the satisfaction of the judgment. *Phelps v. Curtis*, S. C. Ill., *Ib.*

10. A CONVEYANCE MADE IN FRAUD OF CREDITORS IS VOIDABLE AND NOT VOID, and the property embraced in it does not absolutely vest in the assignee as a portion of the bankrupt's estate. *Ib.*

11. A CROSS-BILL SETTING UP DEFENDANT'S DISCHARGE IN BANKRUPTCY is not defective in not making his assignee a party, where almost four years have elapsed since the appointment of the assignee, and he has made a final settlement and been discharged. *Ib.*

12. IN ORDER TO RENDER VOID A CONVEYANCE MADE BY A BANK-

RUPT WITHIN FOUR MONTHS of filing a petition, with a view to give a preference or other conveyance within six months, it must appear that the person taking it *knew* that it was made in fraud of the provisions of the bankrupt act in the one case, or to prevent the property coming to the assignee, or from being distributed under the act, in the other. A conveyance made to secure an actual loan is valid if made and taken in good faith. Neither bad faith nor its equivalent, conduct wanting in good faith, is to be assumed but must be proved. *Campbell v. White*, D. C. U. S. Vt., *Ib.*

13. GUARDIAN'S BOND. — A DISCHARGE in bankruptcy releases the bankrupt from liability as surety on a guardian's bond. *Reitz v. The People*, *Ib.* Nos. 2 and 3.

14. WHERE GOODS ARE FRAUDULENTLY SHIPPED BEYOND CONTROL OF VENDOR. — DISCHARGE. — Where one purchases goods under a contract to pay cash on delivery, and upon delivery ships them beyond the control of the vendor, and then refuses payment, such conduct may be regarded as a fraud in the creation of the debt under section 33 of the bankrupt act, and his discharge will not release him. *Classen v. Schoneman*, S. C. Ill., *Ib.* No. 3.

15. BAD DEBTS BOUGHT TO BE USED AS SET-OFF. — A court of equity will not aid a debtor to a bankrupt's estate to set off debts bought upon a speculation of the probable dividends against the debt he owes the estate. *Hunt v. Holmes*, D. C. U. S. Mass., *Ib.*

16. KNOWLEDGE THAT A MERCHANT HAS SUSPENDED payment generally includes a constructive knowledge of each particular suspension. *Ib.*

17. COMPOSITION. — SET-OFF. — DILIGENCE. — A creditor who receives a composition from his bankrupt debtor, with full knowledge of all the facts, is not entitled afterwards to require a set-off to be enforced by a court of equity which he had opportunity to assert at the time the composition was made. *Ib.*

18. JUDGMENT CREDITOR. — PRIORITY. — WHERE AN ATTACHMENT upon property of the bankrupt for its full value is dissolved by an adjudication, a judgment creditor who has made a levy subject to such attachment is not entitled to priority as against the assignee. But where a creditor has obtained a valid and effectual lien by attachment, and has prosecuted his suit to judgment, and made an execution levy, his lien under such levy is to be considered as prior in time to that of other creditors who have levied attachments in the mean time, and is not affected by the dissolution of the attachments. *In re Steele*, D. C. U. S. E. D. Wisc., *Ib.*

19. SUBROGATION. — WHERE A PARTNERSHIP OF TWO PARTNERS IN EQUAL INTEREST was bound as a firm as surety for a debt, and a decree was rendered against the firm for the debt to be paid, and which was paid out of the social assets, the firm having been dissolved, and a balance having been left due, but not ascertained by judicial judgment or decree, from one of the partners to the other, and the partner who owed the balance having, after all this, gone into bankruptcy: *Held*, that the solvent partner had no right to be subrogated to the rights of the creditor of the firm, who obtained the decree, for half the amount paid, against the individual

estate of the bankrupt partner, as against other creditors of that partner. *In re Smith*, D. C. U. S. E. D. Va., *Ib.*

20. CREATION OF DEBT BY FRAUD.—SECTION 5117 CONSTRUED.—When A. obtains goods of B., representing himself to possess property which he does not possess, and such representations induce a credit which the seller would not give without it, A. has “created” a debt “by fraud,” in violation of section 5117, Revised Statutes. When A. obtains goods, making no other special promise of payment than is involved in the ordinary assumpsit or undertaking to pay for goods purchased, but deliberately intending at the time not to pay for them, he has “created” a debt by “fraud,” in violation of the provisions of the bankrupt law in section 5117 Revised Statutes United States. *In re Alsberg*, D. C. U. S. Del., *Ib.*

21. *IBID.* — HABEAS CORPUS. — EVIDENCE, ETC. — Where a bankrupt is in prison or under arrest for a debt which is not dischargeable in bankruptcy, the United States court, on a writ of *habeas corpus*, will not discharge him. “Order 27 in Bankruptcy,” prescribed by the supreme court of the United States for the regulation and government of the courts in bankruptcy matters, as regards the arrest of the bankrupt and petition for release, must be construed as not applying to cases where the debt is dischargeable. The question to be determined is one of fact, viz.: Was the debt for which the bankrupt was arrested dischargeable under the bankrupt law, or not? This question must be determined by the court or judge hearing the *habeas corpus* case, on all the legal evidence within its or his reach. No *ex parte* affidavits made in the state courts as to character of the debt contracted, and no evidence of want of authority in the state courts to arrest for the frauds contemplated by section 5117 of the Revised Statutes, will be permitted to interfere with the full examination from all sources of evidence of the simple fact, whether the debt was or was not dischargeable under the bankrupt act. If the debt for which the prisoner is arrested is of such a character, it matters not that the state laws do not give authority to arrest for the frauds mentioned in said section. *Ib.*

22. ASSENT OF CREDITORS AND AMOUNT OF ASSETS. — In the absence of consent by creditors in voluntary cases, no matter when commenced nor when debts were contracted, the assets must pay thirty per cent., not fifty per cent., or there can be no discharge; in compulsory cases the bankrupt, if otherwise entitled thereto, is entitled to a discharge irrespective of the assent of creditors or the amount of his assets. *In re Gifford*, D. C. U. S. W. D. Mich., *Ib.*

BILLS AND NOTES.

1. NOTICE. — THE HOLDER OF DISHONORED PAPER MAY GIVE NOTICE directly to all prior parties, or only to his immediate predecessor on the paper. In the latter case, such predecessor has the same time to give notice to his indorser as though he himself had been the holder and had the paper protested. A banker or agent, to whom paper has been transmitted for the purpose of obtaining acceptance or payment, is, so far as the question of notice is concerned, to be considered as though he were the real holder and his principal a prior indorser. A note, payable in Topeka, was, on August 5, legally protested there, and notice thereof for-

warded by mail by the banker, who held the note for collection, to the owners at Fort Scott. Notice, when received, was sent by them by mail to the indorser at Atchison. It took a letter two days to go by mail from Topeka to Fort Scott, and two days to go in like manner from Fort Scott to Atchison. The indorser received the notice on August 10; the 9th was Sunday. *Held*, that a finding that legal notice had been given must be sustained, although it appeared that there was a daily mail between Topeka and Atchison, and that all parties except the notary knew where the indorser resided, and although it was not shown at what exact hour the notice was deposited in the post-office at Topeka or at Fort Scott, or received by the owners or the indorser, or what hours the mail left Topeka or Fort Scott, or reached Fort Scott or Atchison. *Seaton v. Scoville*, S. C. Kans., Cent. L. J., August 24, 1877.

2. NEGOTIABILITY OF NOTE. — COLLECTION FEE CLAUSE. — A clause in a promissory note, allowing a commission upon its face as a collection fee, in case of its non-payment at maturity, renders the note uncertain and destroys its negotiability. A promissory note in the usual form contained, immediately after the amount, the words "and five per cent. collection fee if not paid when due." In an action by the holder against the indorser: *Held*, that the note was not negotiable, and that defendant was therefore not liable as an indorser of negotiable paper. *Woods v. North*, S. C. Pa., W. N. C., August 15, 1877.

See INFANT.

BOND.

1. ACTION ON OFFICIAL BOND. — PRESUMPTIONS. — H. was appointed superintendent of Indian affairs to succeed himself, and at the date of the execution of his second bond there was a balance due the United States of the moneys received by him under his first bond: *Held*, that there could be no presumption that this sum had been illegally appropriated by the officer, but the fact must be proved by the party claiming or alleging it; and that in the absence of such proof, the presumption is that this balance was then in the hands of the officer, to be applied and accounted for under his second bond. *United States v. Earhart*, C. C. U. S. Oregon, Pac. Law Rep., August 14, 1877.

2. IBID. — LIMITATIONS. — MARSHAL'S BOND. — Section 784, of the Revised Statutes, limiting the time within which actions must be commenced on marshals' bonds, does not apply to actions instituted by the United States. *United States v. Rand*, C. C. U. S. Cal., Ib.

See BANKRUPTCY, 13.

"CIVIL DAMAGE" LAW.

See DAMAGES, 3; EVIDENCE, 3; PLEADING AND PRACTICE, 3.

CONTRACT.

See INFANT.

CRIMINAL LAW.

1. EVIDENCE OF ACCUSED. — BELIEF OF, THAT HIS LIFE WAS IN DANGER. — On an indictment for murder, where the defence is a justification of the act, it is error not to permit the accused to testify that, at the time he fired the shot, he believed himself to be in danger of losing his life. *State v. Harrington*, S. C. Nev., Cent. L. J., August 17, 1877.

2. REQUISITES OF INDICTMENT. — FORGERY. — An indictment under section 21, p. 471, 1 Wag. Stat. (Missouri), which fails to use any of the words *pass, utter, or publish*, but uses the words "sell, exchange, and deliver," is good if the acts charged constitute a passing of a forged instrument; and where the indictment charges that the defendant did "sell, exchange, and deliver," the forged paper, and the acts charged show affirmatively that he *did not* do so, yet he may be convicted of *passing* it, although the indictment does not charge that he did so. It is not necessary to charge the crime in the *descriptive words of the statute, nor in equivalent, nor in interchangeable or convertible terms*; but it is sufficient if words be used which, in connection with the acts charged, in common parlance constitute the crime imputed by the words used in the statute to define the offence. *Watson v. The State*, S. C. Mo., Cent. L. J., August 31, 1877.

DAMAGES.

1. CAUSA PROXIMA. — DEFECTIVE SHAFT. — Under the statute of Illinois of July 1, 1872, compelling owners of coal mines to make escapement shafts in their mines, and giving a right of action to any one damaged by a failure on the part of an owner to comply therewith: *Held*, that proof of failure on the part of an owner so to comply with the statute, and that such failure contributed to the injury complained of, entitles plaintiff to recover, notwithstanding the *immediate* cause of the injury may have been the result of accident, and not the result of any fault on the part of the owner. *Wesley City Coal Co. v. Healer*, S. C. Ill., Cent. L. J., August 24, 1877.

2. MEASURE OF. — WHERE THE WATER OF A STREAM HAD BEEN DIVERTED from flowing in its accustomed channel, by reason of the erection by H. of a dam at its source, whereby A. through whose land it had flowed sustained damage: *Held*, that the measure of damages was the difference in the market value of the property of A. as a farm and ore bank immediately before H. appropriated the stream, and immediately afterwards as affected thereby, without regard to the fact that A. had formerly used the water or might hereafter require it for use in washing the ore obtained from his ore bank. *Hanover Water Co. v. Ashland Iron Co.*, W. N. C., August 23, 1877.

3. "CIVIL DAMAGE ACT." — EXEMPLARY DAMAGES. — EVIDENCE. — Under a statute giving exemplary damages to the wife "who shall be injured in person, property, means of support, or otherwise . . . by reason of the intoxication of any person," it is *held* proper to show that she had been excluded from society on account of her husband's intoxication, and to give evidence of her mental sufferings, generally, on account of his drunkenness. But facts should not be admitted tending to prove dam-

ages that are merely fanciful or too remote. *Friend v. Dunks*, S. C. Mich., Cent. L. J., September 17, 1877.

EQUITY.

AN OFFICIAL BOND THAT IS DEFECTIVE cannot be reformed in equity. *Trustees, &c. v. Otis*, S. C. Ill., Cent. L. J., August 24, 1877.

ESTOPPEL.

See VENDOR AND VENDEE.

EVIDENCE.

1. CONTRACT UNDER SEAL. — OTHER WRITINGS AND PAROL EVIDENCE TO EXPLAIN. — The M. Co. advertised for proposals for a bridge, the proposals to specify the strain upon the metal in sustaining the required weight. The A. Co. sent such proposal in writing, and afterwards entered into a contract, under seal, to build the bridge "according to the specifications hereunto annexed." No specifications were annexed to the contract, but on its back was pasted the advertisement for proposals. The A. Co. built the bridge, and brought an action of covenant for the price. Defendants offered in evidence plaintiffs' written proposals, to be followed by evidence of declarations made by plaintiff's president immediately before the execution of the contract, and showing that the contract was based upon these proposals. *Held*, that both offers of evidence should have been admitted. *Monocacy Bridge Co. v. Am. Iron Bridge Man. Co.*, S. C. Pa., W. N. C., September 6, 1877.

2. THE DECLARATIONS AND ADMISSIONS OF A SPECIAL AGENT, which are not within the scope of his authority, are not admissible in evidence against his principal. *Ib.*

3. "CIVIL DAMAGE" ACT. — WHAT MAY BE PROVED. — In an action for injuries to a wife arising from the sale of liquor to her husband, there should, as a rule, be no evidence allowed of facts antecedent to the unlawful acts complained of, except to show his habits and circumstances before they were committed; but the jury should be told to discriminate between losses caused by commercial changes and those which result from drunken neglect. The evidence of his pecuniary condition before the acts complained of is not to be introduced as showing a substantive cause of action, but to be considered with other facts as showing the damage sustained by plaintiff. The mere fact that a man had been of intemperate habits before he began to buy liquor of a particular dealer, will not prevent his wife from recovering in an action against that dealer for injuries done her by sales which he had made to her husband. *Friend v. Dunks*, S. C. Mich., Cent. L. J., September 17, 1877.

4. PROOF OF SIGNATURE. — COMPARISON. — A signature offered for the purpose of comparison cannot be proved to be an original and a genuine signature, merely by the opinion of a witness that it is so, such opinion being derived solely from the witness's general knowledge of the handwriting of the person whose signature it purports to be. *Eborn v. Zimpleman*, S. C. Texas, Cent. L. J., August 31, 1877.

5. PHOTOGRAPHIC COPIES OF INSTRUMENTS SUED ON CAN ONLY BE USED AS SECONDARY EVIDENCE. — Like letter-press copies, they are copies which may or may not be *fac-similes* of their originals. It is a question of fact as to whether a photographic copy of a writing, when offered in evidence, is a mathematically exact reproduction of its original. *Id.*

See BANKRUPTCY, 21; CRIMINAL LAW, 1; DAMAGES, 8; PLEADING AND PRACTICE, 1.

FRAUDS, STATUTE OF.

ORAL GUARANTEE OF NOTE. — If A. pays a debt to B. by delivering him the note of C. and orally guarantees the payment thereof, such guaranty is void under the statute of frauds, — his own original debt being thereby discharged. *Dows v. Swett*, S. C. Mass., Am. Law Reg., August, 1877.

FRAUDULENT CONVEYANCE.

TITLE ACQUIRED UNDER FRAUDULENT CONVEYANCE. — A voluntary conveyance of property, made for the purpose of defrauding the creditors of the grantor, will pass the title to the grantee, and the property will be subject to levy or sale as the property of the latter, at the suit of his creditors. Though the conveyance be subject to disaffirmance for fraud at the suit of the creditors of the grantor, it cannot be impeached by the representatives, heirs, or devisees of the grantor, or by any person claiming under him. *Fowlkes v. Harris*, S. C. Tenn., Cent. L. J., August 24, 1877.

HABEAS CORPUS.

See BANKRUPTCY, 21.

INFANT.

CONTRACT. — PARTNERSHIP. — RATIFICATION. — THE PROMISE OF AN INFANT TO PAY CHECKS drawn in the name of the firm of which he is a member is voidable, and the burden of proof is upon the plaintiff to show a ratification by the defendant after he became of age. In an action against an infant upon two checks drawn by a firm of which he was a member, the facts that a portion of the goods which formed the consideration of the checks remained unsold up to the time of the dissolution of the partnership, which was seven weeks after the defendant became of age; that during the said seven weeks he drew money for his personal use, from time to time, from the firm; and that, at the dissolution, his partners agreed with him that they would answer and pay all the debts of the firm, do not constitute a ratification of his promise to pay. *Tobey v. Wood*, S. C. Mass., Cent. L. J., August 10, 1877; Albany L. J., August 25, 1877.

INSURANCE.

1. CONSTRUCTION OF POLICY. — WAIVER. — CONDITION THAT WAIVER MUST BE INDORSED ON POLICY, ETC. — By the terms of an insur-

ance policy "no agent or other person, excepting one of the general officers of the company (and then only by indorsement hereon made and signed by said officer), is authorized to waive, change, alter, or amend any condition or provision of this policy." The secretary having requested the plaintiff's adjuster to delay making out proofs of loss, pending estimates for rebuilding, thereby leading the insured to believe that proofs of loss would not be required within the time specified in the conditions: *Held*, that it was a question of fact for the jury whether there was a waiver or not. *State Ins. Co. v. Todd*, S. C. Pa., W. N. C., August 16, 1877.

2. INCUMBRANCE. — KNOWLEDGE OF INSURED. — The terms of a policy stipulated that "if any incumbrance exists on the insured property at the date of this policy . . . and the insured shall fail to notify the secretary of this company thereof in writing . . . this company shall not be liable for loss or damage under this policy." An undisclosed mortgage existed at the time of issuing the policy; subsequently, through the same agents, the mortgagee's interest was insured under another policy, and eight months after a renewal certificate of the first policy was issued. Both policies were signed by the president and secretary of the company, and countersigned by the agents: *Held*, that the above facts, if not conclusive, were yet sufficient to warrant the jury in finding that the defendant had knowledge of the incumbrance. *Ib.*

INTEREST.

See BANKRUPTCY, 1.

LIMITATIONS.

See BOND, 2; TRUST, 2.

MECHANIC'S LIEN.

See MUNICIPAL CORPORATION, 3.

MORTGAGE.

1. CONSIDERATION. — WHERE MORTGAGE IS HELD BY MORTGAGOR. — NOTICE, ETC. — A mortgage duly executed and recorded, but made without consideration and remaining in the hands of the mortgagor, is inchoate, not void; and a subsequent sale of it by the mortgagor to a purchaser for value, and a delivery to said purchaser of an assignment duly executed by the nominal mortgagee, renders the mortgage binding as against a subsequent purchaser of the property who acquired title after the delivery of the assignment but before it was recorded.

L., the owner of property, executed and recorded mortgages thereon to S. These mortgages were without consideration, and were never delivered to S., being retained by L. after recording. Afterwards L. sold the mortgages to M. for a consideration, and transferred them to him by assignments duly executed by S. These assignments were not recorded for nearly two years. Prior to the recording of the assignments, but after their delivery, L. sold the property to J., who purchased for value and without actual knowledge or notice of the existence of the mortgages. In

actions brought by M. upon the mortgages, a special verdict being rendered setting forth the above facts: *Held*, that judgment was properly entered for the plaintiff. *Johnson v. McCurdy*, S. C. Pa., W. N. C., September 6, 1877.

2. MORTGAGE TO SECURE COUPON BONDS. — SHERIFF'S SALE, ETC. — Holders of bonds, the whole series of which are secured by a mortgage, share *pro rata* in the distribution of the proceeds from the sale of the mortgaged property, and this notwithstanding an informality in the manner in which the holders acquired the bonds, if they were really entitled to them.

A. issued two hundred coupon bonds, each of \$500, the payment of each and all of which was secured by a mortgage upon certain property. By the terms of the bonds any holder, by indorsement to that effect, could render them not transferable without subsequent indorsement by them. A. indorsed all the bonds to himself or assigns, and subsequently by further indorsement made two of the bonds payable to B. The remainder of the bonds he delivered to C. without any further indorsement, as collateral security for a preëxisting indebtedness and for future advances. The mortgaged property having been sold at sheriff's sale, under a prior incumbrance, and the fund being insufficient to pay all the bonds, B. claimed the payment of his bonds in full out of the proceeds belonging to the mortgage: *Held*, that B. was not entitled to payment in full, but should share *pro rata* with C. in the distribution of the fund. *Hodge's Appeal*, S. C. Pa., W. N. C., August 23, 1877.

MUNICIPAL CORPORATION.

1. POWER OF PUBLIC AGENTS TO BIND. — The superintendents of the construction of a county court-house, employed by the county board of supervisors, have no authority to bind the county to the payment of orders, accepted by them as such superintendents, drawn by a sub-contractor for work done in the building of the court-house, and no equitable assignment of a contract can attach to the county from such acts; the assumption of obligations as well as the disbursement of funds being outside the scope of the employment of the superintendents, and the board of supervisors of the county only acting as a board, having authority to incur obligations. *Bouton v. Board of Supervisors, &c.*, S. C. Ill., Cent. L. J., August 3, 1877.

2. AUTHORITY OF PUBLIC AND PRIVATE AGENTS DISTINGUISHED. — Different rules prevail in respect to the acts and declarations of public agents from those which ordinarily govern in the case of mere private agents. As to the latter, the principals are in many cases bound, where they have not authorized the declarations and representations to be made. But in cases of public agents, the government or other public authority is not bound, unless it manifestly appears that the agent is acting within the scope of his authority, or he is held out as having authority to do the act, or is employed in his capacity as a public agent to make the declarations or representations for the government. *Id.*

3. PROPERTY OF COUNTY NOT SUBJECT TO MECHANIC'S LIEN. — The method provided for the enforcement of a mechanic's lien being by sale upon execution of the property to which the lien attaches for its satisfac-

tion, and as the statute prescribes that an execution cannot issue "against the lands or other property of any county of this state," such property does not come within the provision of the mechanic's lien law, and no such lien can attach thereto. *Ib.*

See RECOVERY OF TAXES.

NATIONAL BANK.

SPECIAL DEPOSIT. — LIABILITY OF BANK. — NEGLIGENCE. — The cashier of a national bank, with the knowledge of the directors, received bonds for safe keeping from a customer, and gave a receipt for them. The bonds were subsequently stolen. No explanation of the robbery being offered: *Held*, that there was in this case sufficient evidence on the question of gross negligence to go to a jury, and that if the bonds were stolen through gross negligence on the part of the bank, the latter was liable. *First National Bank v. Graham*, S. C. Pa., W. N. C., July 26, 1877.

NEGLIGENCE.

CONTRIBUTORY NEGLIGENCE. — IN AN ACTION TO RECOVER FOR THE NEGLIGENT KILLING OF PLAINTIFF'S HUSBAND, the evidence tended to show the following facts: The deceased was struck and killed while attempting to cross defendant's railroad in a frequented path leading across the tracks; the day was clear, and the engine might have been seen for at least fifty yards from the point where the casualty occurred. The bell on the engine was not rung, but the bell of another engine standing in the yard near by was being rung at the time, which might have misled the deceased if he had trusted to hearing alone; he could not have been seen after he passed upon the tracks in order to stop the train. *Held*, that although the defendant's employees were guilty of negligence in not sounding the bell on the engine which caused the injury, yet a verdict for the plaintiff was erroneous, on the ground of the negligence of the deceased in attempting to cross the tracks when he saw, or might have seen, the approaching engine. One who is about to cross a railroad track must look as well as listen; he must be vigilant and watchful, and the failure to exercise such vigilance is negligence *per se*. *Harlan v. St. Louis, &c. Railway Co.*, S. C. Mo., Cent. L. J., September 7, 1877.

See NATIONAL BANK; PLEADING AND PRACTICE, 2.

NOTICE.

See BILLS AND NOTES, 1; MORTGAGE, 1.

OFFICIAL BOND.

See BOND; EQUITY.

PARTNERSHIP.

See INFANT.

PLEADING AND PRACTICE.

1. DEMURRER. — EVIDENCE. — VERDICT. — JUDGMENT. — Where a party demurs to the evidence of a plaintiff on a trial, which demurrer is

overruled by the district court, and afterwards both parties proceed with the case and produce other evidence, and sufficient evidence is introduced to make out a case for the plaintiff, and on the verdict of a jury judgment is rendered in favor of the plaintiff, the supreme court will not reverse the ruling of the district court overruling such demurrer. The court does not err in overruling such demurrer, whenever there is testimony, which, although weak and inconclusive, yet fairly tends to prove every essential fact, and is sufficient to justify a court in overruling a motion to set aside a verdict based thereon. *Chicago, &c. R. R. Co. v. Doyle*, S. C. Kans., Am. Law Reg., August, 1877.

2. PROOF. — IN AN ACTION BY AN EMPLOYEE AGAINST HIS EMPLOYER FOR INJURIES caused by the negligence of a fellow-servant, an allegation that the employer knew of the latter's unfitness and recklessness is sustained by proof that such incompetency ought to have been known by the defendant. Where the employee is so grossly and notoriously unfit that not to know of his unfitness is negligence, the law presumes notice to the employer. *Id.*

3. "CIVIL DAMAGE" ACT. — MISJOINDER. — THE MICHIGAN STATUTE allowing the recovery of damages for injuries arising from the sale of liquor, also allows money paid for liquor to be recovered as paid without consideration. *Held* (a), that assumpsit is the proper form of action for the recovery of the money paid; (b), that case is the proper form for the recovery of the damages; (c), that it is a misjoinder of causes of action to sue for the recovery of both under a single count in an action of trespass on the case. *Friend v. Dunks*, S. C. Mich., Cent. L. J., September 17, 1877.

See CRIMINAL LAW, 2; RELEASE, 2.

PUBLIC AGENT.

See MUNICIPAL CORPORATION.

RAILROAD.

See NEGLIGENCE.

RATIFICATION.

See INFANT.

RECOVERY OF TAXES.

MUNICIPAL TAXES, ILLEGALLY ASSESSED AND COLLECTED, MAY BE RECOVERED BACK by the tax-payer, if the corporation has acknowledged its error, and admitted its liability to pay the same as a debt. So, a paving assessment, levied on a false and illegal theory, and the payment of which was once enforced, but afterwards admitted to be due to the tax-payer, may be recovered back by him, or offset upon his legal assessments for the same paving, when properly assessed and corrected. But the state courts will not enforce such off-set against a renewed assessment for the same paving tax, which is ordered to be collected in cash by the corporation, by a mandamus from the United States circuit court; and this will be so, even though the municipal corporation be insolvent. The mandate

of the United States circuit court will not be interfered with by the state courts. *Shea v. City of Memphis*, S. C. Tenn., Cent. L. J., August 10, 1877.

RELEASE.

1. WHERE PARTY IS UNDER INFLUENCE OF DRUGS. — Where a party executes a paper, purporting to be a written release, discharging his right of action against a railroad company for injuries complained of, and at the said time he is so much under the influence of drugs and opiates taken to alleviate his pains, caused by a broken thigh, that he is mentally incapacitated to contract, such a release is voidable and not a defence to his cause of action. *Chicago, &c. R. R. Co. v. Doyle*, S. C. Kans., Am. Law Reg., August, 1877.

2. OFFER TO PAY BACK AMOUNT RECEIVED NOT CONDITION PRECEDENT TO RIGHT TO SUE. — In such case it was not necessary for him to pay back, nor offer to pay back, the money received at the time of signing said paper, as a condition precedent to his right to sue on his claim for damages. On the trial, the jury had the right to give the company credit for the money paid at the time the release, so called, was signed. *Id.*

3. RELEASE GIVEN TO EFFECTUATE COMPROMISE. — Payment of part of a debt is not a satisfaction of the whole; and a receipt in full is no bar to a recovery of the balance, if the party giving it has been misled or deceived. But if the parties come together voluntarily, after the services have been rendered, and a dispute exists as to amounts due, and the plaintiff accepts and receives the sum of \$4,000 in full satisfaction and discharge of all claims in pursuance of a settlement, and executes a receipt accordingly, he cannot afterwards maintain an action for a larger amount. *Meguire v. Corwine*, S. C. D. C., W. L. R., August 13, 1877.

SET OFF.

See BANKRUPTCY, 6, 15.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

SUBROGATION.

See BANKRUPTCY, 19.

TAX.

See RECOVERY OF TAXES.

TRUST.

1. POWER OF DISTRIBUTION. — NATURE AND EXTENT OF. — A testator gave an estate to his wife for life, with power "to make any division or distribution of my whole estate, real and personal, among my children" [naming them], "in such shares and proportions as she, in her own discretion, may think best, hereby confirming all bequests and devises and all directions and orders made by her in regard to the same." She devised the whole estate in trust to pay the income in equal proportions to the children, remainder in fee as to each share of the principal to

the appointees of the children, or the persons who would take under the intestate law. *Held*, that the trust was void, and that the legal estate vested absolutely in the children in equal shares. *In re Smith's Estate*, S. C. Pa., W. N. C., August 30, 1877.

2. FRAUD. — LIMITATIONS, ETC. — Suit was brought in 1871 against an administrator, whose intestate, it was alleged, had executed in 1846 the following instruments, viz.: "Borrowed and received from William Eborn, nine hundred dollars, which I promise to return, when called for, with interest, February 3d, 1846. (Signed) Thomas Eborn." "Received of William Eborn six thousand five hundred dollars, which I promise to invest in lands, or return the same when called for, with interest. May 14, 1846. (Signed) Thomas Eborn." The petition alleged that the money had been received on both instruments by the obligor, with the understanding that he should go West and invest the same in lands for William Eborn, and if he failed to do so, the money should be returned, with interest; that soon after the last instrument was executed the obligor left North Carolina, in which state the transaction occurred, and was not heard from thereafter until 1870. The statute of limitations of four years was pleaded as a defence. *Held*, the receipt for nine hundred dollars borrowed, to be returned "when called for," created a cause of action from its date, and against it, the statute ran from the time of its execution. (2) Against the receipt for six thousand five hundred dollars, the statute began to run after the lapse of a reasonable time within which to apply the money as required, and after the lapse of said time no demand was necessary. (3) The claim was not an express trust, but must be regarded as a moneyed demand barred by limitation, in the absence of a sufficient acknowledgment, within four years before the institution of the suit. (4) The averment, that the maker of the instruments left, soon after their execution, and that his whereabouts was not known to the holder until 1870, does not make out such a case of fraud as constitutes an exception to the statute of limitations, there being no express charges of fraud, nor any allegation that efforts were made to ascertain his place of residence. (5) The mere removal of a debtor, without communicating to his creditor the place of his new domicile, does not constitute such a fraud as will stop the running of the statute. *Eborn v. Zimpleman*, S. C. Texas, Cent. L. J., August 31, 1877.

USURY.

SALE OF GOLD. — Where a loan of a certain amount in gold was made, but the borrower executed his note therefor for a considerably larger sum than the equivalent value of the gold in currency: *Held*, that the contract was an usurious one, notwithstanding the claim by the lender, that the amount in excess of the value of the gold was not intended for interest, but was simply the rate at which he held the gold. *Austin v. Walker*, S. C. Iowa, Cent. L. J., September 7, 1877.

VENDOR AND VENDEE.

VENDOR'S LIEN. — ESTOPPEL. — A vendor of land may retain upon the face of his deed a lien for a debt due, which is no part of the consider-

ation for the land. The vendee, though he do not sign the deed, will be estopped, by his acceptance of it, from impeaching the lien. *Trezevant v. Bettis*, S. C. Tenn., Cent. L. J., September 7, 1877.

SUPERIOR COURT OF NEW HAMPSHIRE.

(To appear in 57 N. H.)

EQUITY PRACTICE. — MORTGAGE. — TENDER.

WATKINS v. WATKINS.

When, in a proceeding in equity for the redemption of a mortgage, it appeared that the defendant had fraudulently prevented the plaintiff from seasonably redeeming the mortgage, and had neglected to render, when requested, an account of the amount due : *Held*, that the bill should not be dismissed, because the plaintiff did not tender or bring into court the amount due, and that the court below ought to determine the amount due, and decree that, on payment within some reasonable time to be fixed by the court, the defendant should release the mortgaged premises to the plaintiff.

CUSHING, C. J. In this case the plaintiff, William Watkins, states, substantially, that he is the owner of certain real estate, situated in Walpole, which had been by him mortgaged to the Ashuelot Savings Bank on November 7, 1871, and afterwards, August 8, 1873, to Thomas B. Buffum; that his right of redeeming said property had been sold, January 4, 1874, and the right of redeeming from that sale had been sold, on execution, July 7, 1874; that a foreclosure of the mortgages had been commenced, and possession taken, under process of law, July 15, 1874, so that his right to redeem from said mortgages would be foreclosed July 15, 1875; that the right to redeem from the first execution sale expired January 24, 1875, and the right to redeem from the second execution sale would expire July 27, 1875; that the defendant had become the owner, by assignment, of the mortgages, and was the purchaser at said execution sales; that the property was worth at least \$3,000 more than all the liens upon it, and that he, as the defendant well knew, fully intended to redeem it, but by fraudulent and collusive inducements and promises he had been induced to let the said day of redemption from the first execution sale pass by, relying on the defendant's promise that it should make no difference; that on March 17, 1875, he made a written demand on the defendant for an account of the amount due upon the mortgages and upon the execution sales, which the defendant neglected to render; and he prayed that the amount due the defendant might be ascertained by the court, and that the defendant might be decreed, on the payment by the plaintiff of the amount due, to release the said mortgaged premises.

The case, as drawn, shows that the bill only embraced the matter of the redemption of the premises from the first execution sale; but the bill and answer being made part of the case, the whole matter, as stated above, becomes apparent. The case having been tried by the court, an order was made that the plaintiff should be permitted to redeem, unless the objection taken by the defendant, that the amount due had not been brought into court, should prevail. This decree, however, applied only to the first execution sale, and did not apply to the mortgages. The bill, as will be seen, seeks to have the whole amount due determined.

By the statute — Gen. Stats. ch. 122 — the plaintiff was entitled to demand of the defendant an account of the amount due on the mortgages; and, if the defendant unreasonably neglected to account, the plaintiff might commence his proceeding, and the court should determine the amount due on the mortgages, and make an order that, on the amount being brought into court by the plaintiff, the court should decree that such mortgages be discharged.

The defendant, in his answer, gives no sufficient reason for neglecting to render an account; and it seems evident, from the statement which he makes in his amended answer, that he might very readily have done it.

The plaintiff, then, was entitled to maintain his position to this extent, viz., to have the amount due on the mortgages determined, and the proper decree.

By the finding of the court, it is apparent that the allegations in the bill concerning the fraudulent contrivance of the defendant to prevent the property from being redeemed are made out, and the plaintiff is entitled to his further remedy, unless he is barred from it by his failure to make a tender, and bring into court the amount due on that sale. I cannot see anything in the authorities cited to this effect. In fact, no case is cited at all like this; and it seems to me that it was enough for the plaintiff to show his willingness to pay when the proper decree was made.

It is said in the argument, and in some of the cases, that the plaintiff ought to show by his bill enough to entitle him to a decree if the allegations of the bill are admitted. I cannot see any occasion for the plaintiff's tendering the amount due on the first execution sale in preference to having it included in the general decree on the mortgages.

The second execution sale is so connected with the other matters, and, in fact, so enters into a part of the defendant's contrivance to circumvent the plaintiff, that I think the foreclosure on that ought to be opened, and the plaintiff allowed to redeem from that also.

My opinion, therefore, is, that the court below ought to determine the amount due to the plaintiff, and make a decree that, on payment by him of that sum within some reasonable time to be fixed by the court, the defendant should release the premises to the plaintiff.

Exception sustained.

NOTES OF NEW BOOKS.

Messrs. THOMPSON & STEVENSON, publishers of the *Central Law Journal*, have added another to their valuable "Monographs:" *Void Execution, Judicial and Probate Sales*. By A. C. FREEMAN. It is enough to say of it that it is almost as timely and not less ably written than the best of the series.

Messrs. HURD & HOUGHTON, New York, the Riverside Press, Cambridge, have ready Volume V. of *Bennett's Fire Insurance Cases*. Embracing all the Reported Cases in Great Britain and America, including Canada and the British Provinces. With Notes and References. By HON. E. H. BENNETT. Price, \$6.50.

This volume covers the period from 1865 to 1874, and gives the latest and freshest cases, completing the series.

The same Publishers have nearly ready their promised work on *Mortgages* by Mr. JONES.

JOHN D. PARSONS, Esq., announces as in press and soon to be finished a *Treatise on Private Corporations for Pecuniary Gain*. By GEO. W. FIELD, Esq.

The *San Francisco Law Journal* is the title of a new periodical to be devoted to the interests of the profession upon the Pacific slope. The work is published by Messrs. BAGGETT & CO., of San Francisco.

THE AMERICAN LAW TIMES.

NEW SERIES. — NOVEMBER, 1877. — VOL. IV., No. 11.

DIGEST OF CASES

PUBLISHED IN EXTENSO IN LATE ISSUES OF AMERICAN LEGAL PERIODICALS.

ABBREVIATIONS.

Albany L. J. — *Albany Law Journal*, Albany, N. Y., WEED, PARSONS & CO.
Am. Law Rec. — *American Law Record*, Cincinnati, O., H. M. MOOS.
Am. Law Reg. — *American Law Register*, Philadelphia, Pa., D. B. CANFIELD & CO.
Cent. L. J. — *Central Law Journal*, St. Louis, Mo., SEYMOUR D. THOMPSON.
Chicago L. N. — *Chicago Legal News*, Chicago, Ill., CHICAGO LEGAL NEWS CO.
Ins. L. J. — *Insurance Law Journal*, New York, C. C. HINE, 176 Broadway.
Int. Rev. Rec. — *Internal Revenue Record*, New York, W. P. & F. C. CHURCH.
La. L. J. — *Louisiana Law Journal*, New Orleans, La.
Leg. Chron. — *Legal Chronicle*, Pottsville, Pa., SOL. FOSTER, JR.
Leg. Int. — *Legal Intelligencer*, Philadelphia, Pa., J. M. POWER WALLACE.
Mo. Jur. — *Monthly Jurist*, Bloomington, Ill., T. F. TIPTON.
N. B. R. — *National Bankruptcy Register*, New York, CAMPBELL & CO.
Pac. Law Rep. — *Pacific Law Reporter*, San Francisco, Cal., J. P. BOGARDUS.
Pittsb. L. J. — *Pittsburg Legal Journal*, Pittsburg, Pa., J. W. & J. S. MURRAY.
W. L. R. — *Washington Law Reporter*, Washington, D. C., JNO. L. GINCK.
W. N. C. — *Weekly Notes of Cases*, Philadelphia, KAY & BRO.
West. Jur. — *Western Jurist*, Des Moines, Iowa, MILLS & CO.

ADMIRALTY.

1. SEAMAN'S WAGES. — Where a Canadian vessel is in custody of the marshal, upon a claim made by an American citizen, the court will take jurisdiction of an intervening libel filed by one of her seamen, notwithstanding his contract is made and performed in Canada, and all the parties are British subjects. As the lien of the seaman exists by the general maritime law, the courts of this country will enforce such a lien arising in Canada, notwithstanding the absence of admiralty courts there. *The Champion*, D. C. U. S. E. D. Mich., Chicago L. N., September 29, 1877.

2. THERE IS NO LIEN FOR SERVICES AS SHIP-KEEPER WHILE THE VESSEL IS LAID UP DURING THE WINTER. — Where a party shipped as seaman in the spring, served as such during the season of navigation, and then remained on board during the winter, keeping the ship: *Held*, that he could recover as seaman only for his services during the season of navigation though no new contract was made. *Id.*

See BILL OF LADING.

ATTORNEY.

See BANKRUPTCY, 2.

BANKRUPTCY.

1. A CREDITOR HAVING A LIEN UPON THE BANKRUPT'S ESTATE MAY DECLINE TO APPEAR in the bankrupt court, in which case he will be unaffected by the proceedings unless the proper steps are taken to sell the estate clear of all incumbrances; or he may elect to prove his debt in the bankruptcy proceedings and rely upon his security, and such action will be a waiver of his right to institute any suit or proceeding in any way inconsistent with such election. *Spillman v. Johnson*, Ct. App. Va., 16 N. B. R. No. 4.

2. OBJECTION CANNOT BE MADE IN COLLATERAL PROCEEDING. — ATTORNEY. — An objection that the purchaser at a sale made by the assignee in bankruptcy was the attorney for the assignee, and as such was incapable of purchasing, cannot be raised in a collateral action, but must be made in the bankrupt court. *Ib.*

3. OMISSION FROM SCHEDULE. — IF A BANKRUPT HONESTLY REGARDS A JUDGMENT HELD BY HIM AS WORTHLESS, he is not chargeable with false swearing or fraud if he omit it from his schedule. Even if it has value as an asset, and he considers it as having value, still its omission must be intentional in order to charge him with false swearing or fraud. *In re Winsor*, D. C. U. S. W. D. Mich., *Ib.*

4. BOOKS OF ACCOUNT. — A MERCHANT OR TRADER WHO, PRIOR TO HIS BECOMING SUCH, HAS KEPT BOOKS of account showing the state of his affairs, is not required to carry their contents or any part of them into his books opened and kept as a trader, in order to satisfy the requirement of the statute as to a bankrupt keeping proper books of account while he is a merchant or tradesman. *Ib.*

5. KEEPING PROPER BOOKS OF ACCOUNT, WITHIN THE MEANING OF THE BANKRUPT ACT, is the keeping of an intelligent record of the merchant's or tradesman's affairs, and with that reasonable degree of accuracy and care which is to be expected from an intelligent man in that business, and a casual mistake therein will not prevent a discharge. *Ib.*

6. *IBID.* — IT IS NOT REQUIRED THAT A CHATTEL MORTGAGE given to secure a debt shall be entered upon the merchant's or trader's books. An entry of notes upon the fly-leaf of the blotter is sufficient. *Ib.*

7. ASSIGNMENT OF EQUITABLE ESTATE, ETC. — WHEN VALID. — In North Carolina a bond for title given on an executory contract for the purchase of lands conveys an equitable estate in the land to the vendee which is assignable. An assignment of such estate to indemnify sureties, made without intent to delay or defraud creditors, is valid, and the assignee is entitled to priority over judgment creditors of the assignor. Such assignment is valid although no money is paid; the debt upon which the sureties are liable furnishes a sufficient consideration to support it. It need not be registered to be available against creditors, unless the time limited by statute for the registration of the bond has expired. *In re Reynolds*, D. C. U. S. W. D. N. C., *Ib.*

8. RIGHTS OF SURETIES. — WHERE THE PRINCIPAL ON A DEBT IS IN-

SOLVENT, the sureties, in respect to their liability, are regarded in equity as creditors, and may retain any funds of the principal in their hands, even against an assignee for value, without notice. *Ib.*

9. AN INTEREST IN LANDS ACQUIRED AT AN ADMINISTRATOR'S SALE, where the administrator has not made title, is assignable; and such assignment need not be registered under the laws of North Carolina in order to be valid against creditors. Such equitable interest is liable to the liens of judgment creditors, subject to the equities of a surety of the debtor who holds a prior assignment thereof as indemnity for his liability. *Ib.*

10. COMPENSATION OF ASSIGNEE. — WHERE AN INSOLVENT WHO HAS MADE A GENERAL ASSIGNMENT for the benefit of creditors is afterwards adjudged a bankrupt, the assignee under the assignment is entitled to his disbursements legitimately made in the execution of his trust, but is not entitled to priority as to his compensation as such assignee, nor as to attorneys' fees incurred in connection with the assignment; as to such items he stands in the same position as other creditors and must prove his claim. *In re Lains*, D. C. U. S. Minn., *Ib.*

11. ACTION AGAINST ASSIGNEE. — WHERE THE MARSHAL HAS DEMANDED AND RECEIVED FROM A SHERIFF PROPERTY which the latter holds under an execution levy, and delivers the same to the assignee, an action for a wrongful taking and conversion cannot be maintained by the judgment creditor against the assignee. Such an action cannot be maintained in a state court as an enforcement of a lien upon the funds in the hands of the assignee, acquired by virtue of the judgment. Such lien can only be enforced in the bankrupt court. *Ansonia Brass & Copper Co. v. Pratt*, S. C. N. Y., *Ib.*

12. INJUNCTION TO PREVENT ASSIGNEE INTERFERING WITH ASSETS. Upon the institution of proceedings in bankruptcy, an assignee for the benefit of creditors may be enjoined from interfering with the debtor's assets before an adjudication has been had. *In re Skoll*, D. C. U. S. Minn., *Ib.*

13. PRACTICE. — WHERE NOTES GIVEN UPON A COMPOSITION SETTLEMENT FALL DUE PENDING ACTION UPON A PETITION TO REVIEW the order of confirmation, and the petitioners refuse to receive payment, the money must be paid into court in order to absolve the bankrupt from liability. Under such circumstances, upon a subsequent demand of payment by the creditor, and refusal by the bankrupt, the former is entitled to a summary order for payment. *In re Reynolds*, D. C. U. S. S. D. N. Y., *Ib.*

14. ASSIGNMENT. — DELIVERY OF SCHEDULES IS NOT NECESSARY to the validity of an assignment for the benefit of creditors. *In re Kimball*, D. C. U. S. W. D. Mich., *Ib.*

15. POSSESSION OF PROPERTY. — A DELAY OF MORE THAN THREE MONTHS in filing the petition in bankruptcy after the execution and delivery of an assignment for the benefit of creditors, will deprive the assignee in bankruptcy of the right to the possession of the property assigned. *Ib.*

16. IF ON DISSOLUTION OF A COPARTNERSHIP, THE RETIRING PARTNER TAKES OUT A PORTION OF THE ASSETS of the firm for his individual use, he must do so without impairing the fund to which the creditors have the right in equity to look for payment; and it must be made clearly to appear

that such remaining fund is ample. Where a copartnership is insolvent, or is possessed of assets not more than adequate for the payment of debts, one member of the firm cannot upon retiring rightfully withdraw beyond the reach of creditors, and to their injury, a portion of the assets and make a personal appropriation of those assets by placing them in the form of a homestead. *In re Sauthoff*, D. C. U. S. Wisc., *Id.*

17. UNDER SUCH CIRCUMSTANCES, THOUGH IT TAKES THE FORM OF A HOMESTEAD, the property is as much within the reach of a court of equity as before; and no such change in its character can give it new sacredness, or endow its possessor with new privileges in its ownership or use. *Id.*

BILL OF LADING.

TITLE. — IF A BILL OF LADING IS SIGNED BEFORE THE GOODS ARE PLACED ON BOARD A VESSEL, BUT UPON THE FAITH AND ASSURANCE THAT THEY ARE TO BE DELIVERED, and afterward they are placed on board as and for the goods embraced in the bill, as against the shipper and master the bill of lading becomes operative and effectual to pass the title of the property to a *bona fide* holder of the bill, by way of relation and estoppel. Priority of lien or title does not depend on the mere priority of signing one of several bills of lading. It is the shipment — the delivery of the property on board — with notice to the party, which fixes the right and vests the property.

D. chartered a vessel to carry 16,300 bushels of wheat from Detroit to Buffalo. The master signed and delivered to D. a bill of lading for 8,000 bushels of No. 1 wheat, consigned to R. & Co., of New York. Five days later, the master signed and delivered to D. a second bill of lading, for 8,300 bushels of No. 1 wheat, consigned to B. & Co., of New York. Both bills of lading were by D. attached to drafts drawn on the respective consignees, and negotiated through the bank, and both were duly paid. There was no wheat on board the vessel when either bill of lading was signed. Subsequent to the execution of the second bill, wheat was placed on board, to the amount of 9,300 bushels, when D. failed, and was unable to deliver any more wheat. There was no designation by the shipper of any portion of the wheat as intended to fill either bill, it being his intention to fill both bills. On demand of R. & Co., the masters delivered to them, as holders of the bill of lading, earliest in date, 8,000 bushels of the wheat, being the full amount called for by their bill, and tendered to B. & Co. the remaining 1,300 bushels. *Held*, that both bills of lading became concurrently operative, when the wheat was placed on board, and in the absence of any appropriation of any portion of the wheat to either bill by the shipper, the holders of the two bills were entitled to share *pro rata* in the wheat actually delivered; and that the vessel was liable to B. & Co. for non-delivery to them of their proportionate share of the grain. *Burkham v. Schooner Farwell*, D. C. U. S. E. D. Wisc., Chicago L. N., September 29, 1877.

CHECK.

See INFANCY.

CONFEDERATE STATES.

See EJECTMENT.

CONSTITUTIONAL LAW.

CORPORATION. — TAXATION. — PASSENGER RAILWAY. — CHARTER, ETC. — A corporation created by an act of 1864, with power to lay a passenger railway in the city of Philadelphia, was, by its charter, made subject to the ordinances of the city regulating the running of passenger railway cars. The charter further provided, in section 10, that "the said company shall also pay such license for each car run by said company as is now paid by other passenger railway companies in the city of Philadelphia." At the time of the incorporation of this company, the rate for license tax was fixed by the ordinances of the city at \$30 for each car run during the year. In 1867 this rate was increased by ordinance \$50 for each car. The Act of 11th April, 1868, enacted that the various passenger railway companies in the city should pay annually to the city the sum of \$50, *as required by their charters*, for each car run during the year. The company paid at the rate of \$50 up to the year 1875, and then refused to pay more than \$30. In an action by the city to recover the tax: —

Held, (1.) That the right of the state to impose a higher tax rate in future upon a corporation cannot be taken away by a mere implication arising from a direction in the charter to pay a certain sum. To fetter her power to levy moneys for public purposes it needs a plainer negation of her own power.

(2.) That the tenth section of the defendants' charter was to be regarded as conferring an authority only upon the city to receive, and imposing an obligation on the company to pay, \$30 per car, but not as a contract on the part of the commonwealth for the relinquishment of her own power to impose a future burden, and therefore that the act of 1868 was not in violation of the Constitution of the United States.

(3.) That, though there was no clause of repeal in the defendants' charter, yet the amendment to the Constitution of the state in 1857 subordinates charters of incorporation thereafter granted to the power to make alterations therein, provided no injustice be done the corporation.

(4.) That, as the defendants up to 1875 paid \$50 for each car without protest, it was a legal conclusion that they accepted the Act of 1868, in order to obtain the benefit of the legislation therein that forbade the city from making regulations affecting it, unless authorized by a law referring in express terms to railway corporations. *Union Pass. R. W. Co. v. City of Phila.*, S. C. Pa., W. N. C., September 20, 1877.

CONTRACT.

1. CONTRACT IN CONTRAVENTION OF STATUTE. — CORPORATION. — A statute required agents of foreign corporations, before entering upon their duties, to file the evidence of their authority with the county clerk, together with the consent of the corporation that suits brought by residents of the state on demands arising out of transactions with such agents might be commenced against the corporation by service of process upon such agent. It then provided that whoever should act as such agent without complying with the statute should be subject to a fine of \$50; and that "such foreign corporation shall not enforce in any courts of this state any contracts made by their agents, or persons assuming to act as their agents,

before a compliance by such agents, or persons acting as such, with the provisions" above recited. *Held*, that a contract entered into by an agent before the filing of such authority and consent was not invalid by reason of such omission. *Held, further*, that the corporation may recover on such a contract, provided such authority and consent are filed previous to the commencement of suit; but the failure to file the same will be valid ground for a plea in abatement. *Wood Mowing, &c. Co. v. Caldwell*, S. C. Ind., Am. Law Reg., September, 1877.

2. *IBID.* — WHILE IT IS A GENERAL RULE that contracts entered into in disregard of statutory provisions are void, the rule is not inflexible, and any case must be considered an exception to it where from the statute the intention of the legislature appears to be that the contract shall not be invalid, but that some other consequence which the statute prescribes shall be the sole penalty. *Ib.*

CORPORATION.

See CONSTITUTIONAL LAW; CONTRACT.

CRIMINAL LAW.

See FALSE PRETENCES.

DEED.

1. THE DEED OF A PERSON NON COMPOS MENTIS IS VOID, and when submitted to show title in an action of ejectment, may be impeached by evidence showing the existence of that condition at the time of the execution of the deed. *Farley v. Parker*, S. C. Oregon, Cent. L. J., September 28, 1877.

2. MAY BE IMPEACHED BEFORE OFFICE FOUND. — Such deed may be impeached, though executed before office found, and while the grantor therein is not under guardianship. *Ib.*

3. EVIDENCE. — INTIMATE ACQUAINTANCE MAY GIVE OPINION. — Under § 696, Sub. Div. 10, Oregon Code, if the testimony shows that the witness is an intimate acquaintance of the insane person, it is sufficient, even though he should not in express words declare the fact. *Ib.*

EJECTMENT.

TITLE TO LANDS HELD BY CONFEDERATE STATES. — EXECUTOR. — ESTOPPEL. — PRACTICE. — The Confederate States, in the year 1862, if not a *de jure*, was a *de facto* government, dominant in the State of Georgia, to which any citizen of the state could sell lands and pass the title while it was so dominant.

When Georgia was overpowered by the federal forces in 1865, and such lands so owned by the Confederate government fell into the hands of the United States by conquest, the title thereto, by such conquest, passed into the government of the United States.

Whilst it is true that before our Code the law was that an executor could not delegate to an agent the trust confided to him by the testator, to sell the lands of his estate, yet when the executor authorized the agent by

power of attorney to make the trade, and prescribed therein the minimum price, and the agent made the deed for the executor, and the latter afterward received the purchase money, these facts vested a perfect equity in the purchaser, and neither the executor, nor the legatees for whom the executor was empowered to act, can recover the land so sold and paid for, particularly after years of silence and acquiescence. *Atkinson v. Central Ga. Agricultural, &c. Soc.*, S. C. Ga., Chicago L. N., September 8, 1877.

ESTOPPEL.

See EJECTMENT.

EVIDENCE.

1. EVIDENCE OF BARGAIN WITH AGENT OF INSURANCE COMPANY. PROOF OF POWERS OF AGENT. — In an action on an alleged oral contract with the local agent for insurance, where the company claimed that he was not authorized to take the class of risks in question, evidence of a bargain with the agent for insurance, without first showing that he had power to contract, was not admissible against the objection of the company. *Reynolds v. Continental Ins. Co.*, S. C. Mich., Ins. L. J., August, 1877.

2. EVIDENCE OF A PRACTICE AT OTHER AGENCIES TO TAKE SUCH RISKS, and that the agent received policies signed in blank, that he solicited the risk and received the premium, was not evidence that he had power to bind the company, in the face of the fact that he was debarred by his commission and the policies, and was properly excluded. *Ib.*

See DEED, 3.

EXECUTOR.

See EJECTMENT.

GRATUITOUS SUBSCRIPTION.

GRATUITOUS SUBSCRIPTION CANNOT BE ENFORCED WHERE PROMISEE HAS NOT INCURRED LIABILITY OR ASSUMED OBLIGATION. — A gratuitous subscription, to promote the objects for which a corporation is established, cannot be enforced unless the promisee has, in reliance on the promise sued on, done something, or incurred or assumed some liability or obligation; it is not sufficient that others were led to subscribe by the subscription sought to be enforced. *Cottage St. M. E. Church v. Kendall*,¹ S. C. Mass., Am. Law Reg., September, 1877.

FALSE PRETENCES.

WHAT CONSTITUTES THE OFFENCE OF OBTAINING MONEY UNDER FALSE PRETENCES. — It is not necessary, to constitute the offence of obtaining goods by false pretences, that the owner has been induced to part with his property solely and entirely by pretences which are false, nor need the pretences be the paramount cause of the delivery to the prisoner. It is sufficient if they are a part of the moving cause, and without

¹ The report of this case is accompanied by a lengthy note by Judge BENNETT. — EDITOR.

them the defrauded party would not have parted with the property. A pretence which is false when made, but true by the act of the person making the same, when the prosecutor relies thereon and parts with his property, is not a false pretence within the statute. To hold a person for trial, who is charged with obtaining money or property by false pretence, it must appear that the pretence relied upon relates to a past event or to some present existing fact, and not to something to happen in the future. A mere promise is not sufficient. *Ex parte Snyder*, S. C. Kans., Cent. L. J., October 5, 1877.

HABEAS CORPUS.

PRACTICE. — POWER OF JUDGE. — UNDER SECTION 672, GEN. STAT. OF KANSAS, 1868, p. 768, the judge or court, issuing a writ of *habeas corpus* on a petition complaining that the person in whose behalf the writ is applied for is restrained of his liberty without probable cause, may, in case there is no defect in the charge or process, summon the prosecuting witness, investigate the criminal charge, and discharge, let to bail, or recommit the prisoner, as may be just and legal. On the hearing and determination of a cause, arising upon a writ of *habeas corpus*, before a judge or court investigating the criminal charge against a person committed by an examining magistrate for the offence of having obtained money or property by false pretences, the prosecutor, when examined as a witness, may testify that he believed the pretences, and, confiding in their truth, was induced thereby to part with his money or property. *Ex parte Snyder*, S. C. Kans., Cent. L. J., October 5, 1877.

INFANCY.

RATIFICATION BY INFANT. — CHECK. — H., a minor, was a partner of a firm which made certain checks in payment of goods purchased by it. H. remained a partner seven weeks after he became of age (during which time the firm retained the goods), and drew money for his own use from the firm. The firm was then dissolved. H. took an agreement from the other members that they would pay its debts. H. then supposed the checks had been paid. *Held*, that H. being an infant when the checks were made was not liable thereon, and his acts subsequent to arriving at age did not constitute a ratification. *Tobey v. Wood*, S. C. Mass., Chicago L. N., September 1, 1877.

INSANITY.

See DEED.

INSURANCE.

1. WAIVER BY AGENT. — FRAUD OF AGENT. — LIABILITY OF COMPANY. — Where the agent of an insurance company, whose business it is to solicit applications for insurance and receive the first premiums, accepts a written application of a person, duly signed, waives the payment in money of the first semi-annual premium, and, in lieu thereof, takes a promissory note, and thereupon executes and delivers to the assured a receipt as follows: "I have received from George Roberts, note for thirty-seven 75-100 dollars, for which (provided the application is approved at the home office)

I agree to furnish him a policy upon his life for two thousand dollars, from the New York Life Insurance Company, within fifteen days from date; or if this application shall be declined, to return the amount to him or his order on demand. It being expressly understood and agreed that no liability is assumed by the company unless the said risk shall be approved and a policy issued at the home office in New York. (\$37.75.) Dated Leavenworth, Kansas, September 17, 1872. (Signed) G. M. Pinkham; and within the fifteen days the application is approved at the home office, and a policy is issued thereon, and sent to the general agent of the company where the application was taken, for the applicant, and after the death of the assured the company has proofs of death made out under the policy, accepts them, sends a draft payable to the beneficiary of the policy, delivers such policy to such beneficiary, and obtains the same receipted and satisfied, and such beneficiary named in the policy does not obtain such draft on account of the fraud of the agent. *Held*, that, notwithstanding a recital in the policy that it should not be binding until the premium was actually paid in money, and the note was not paid, nor the policy otherwise delivered prior to the death of the assured, the insurance company was liable. An insurance company is liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, and omissions of duty of a general agent in the course of his employment, although the company did not authorize or justify such misconduct; it is, likewise, liable to a third person in a civil action for the frauds, deceits, and misrepresentations of its general agent, when the acts so committed are *apparently* within the general scope of his authority, although not so in fact. *New York Life Ins. Co. v. McGowan*, S. C. Kans., Ins. L. J., August, 1871.

2. POWER OF COMPANY. — INVESTMENT OF FUNDS. — SET-OFF. — MORTGAGE. — *ULTRA VIRES*. — The Kansas Insurance Company issued a fire insurance policy of \$1,000 to Palmer Cummings, on his interest in a certain building. After the destruction of the building by fire, and the accruing of a liability on the policy, the company, for the consideration of \$1 and its due-bill for \$500, bought a mortgage of \$1,000 on the premises, for the payment of which Cummings was bound, and sought to offset the mortgage against the policy. Cummings at the time was insolvent, and the premises, after the fire, no security for the mortgage. *Held*, that the circumstances warranted a finding that the company purchased the mortgage not as an investment of its funds, but simply for the purpose of offsetting the policy, and also that, under section 29 of chapter 93 of Laws 1871, page 285, which authorizes fire insurance companies to "invest their capital and funds accumulated in the course of business in bonds and mortgages," such an insurance company has no power to purchase upon credit the mortgage obligation of one insured by the company, and entitled to indemnity for a loss, for the purpose of setting off such mortgage against the policy. *Kansas Ins. Co. v. Craft*, *Ib.*

3. WAIVER BY AGENT. — RENEWAL, ETC. — The policy provided that it should be void if the premium was not paid on the day when due, September 1st, and, that the agent had no authority to waive payment, or accept it when overdue, or alter the contract in any way. The agent was instructed that he might accept premiums until sixty days overdue, upon certificate of continued good health by the medical examiner. The com-

pany was accustomed to accept such overdue payments to the agent without requiring a certificate. The policy was not executed until September 2d, and was not delivered, and the first premium paid, until September 9th. It provided that it should not be binding until such payment. The agent proposed to the insured on August 29th, just before the second premium became due, to credit him with the payment if part was paid and a note given for the remainder, telling him he would otherwise be uninsured after September 1st, which offer was declined by the insured, on the ground that he was going to St. Louis and needed the money, but if able would pay on his return. The renewal receipt was accordingly not delivered to him. The insured intended to keep the policy good, and make payment within thirty days if able. The insured was killed on September 2d, and later on the same day tender of payment was made by his friend. *Held*, that the company was not liable. *Macumber v. St. Louis Life Ins. Co.*, Circuit Court U. S. Neb., Ins. L. J., August, 1877.

4. CONTRACT OF INSURANCE. — WHEN AN ENTIRETY. — The consideration for the insurance named in the policy was single and entire. The amount of insurance was a gross sum apportioned upon several distinct items of property as specified in the policy. *Held*, that the contract of insurance was an entirety, the sole effect of the apportionment being to limit the extent of the insurer's risk as to each item to the sum so specified. *Slath v. Minn. Farmers' Mut. Fire Ins. Ass.*, S. C. Minn., Ins. L. J., August, 1877.

5. BY-LAWS. — SERVICE OF NOTICE. — The by-laws and policy required a written notice of the mortgage to be given by the insured to the secretary of the association: *Held*, that though the service of such notice in the usual manner by mail was sufficient to raise the presumption that it was received by the secretary by due course of mail, it was not conclusive, but could be rebutted by proof of the fact that it was never received. *Id.*

6. STIPULATION THAT FAILURE TO PAY INSTALMENT WOULD AVOID POLICY. — The policy was on the instalment plan, and it was stipulated that the failure to pay any instalment of the note given in part payment of premium would suspend the policy during the continuance of such default. But the company might thereupon enforce the payment of the whole note, and upon such payment, if no loss had occurred, the policy would revive. *Held*, that the stipulation was valid. The company upon default might recover the whole amount of the note and not merely an amount proportionate to the period for which the risk had run. *Am. Ins. Co. v. Klink*, S. C. Mo., Ins. L. J., September, 1877.

7. ACCEPTANCE. — WHAT CONSTITUTES CONTRACT. — PRECISION. — PRESUMPTIONS, ETC. — Plaintiff applied to a local agent for insurance, which he was not allowed to effect without consulting the general agent. An application was filled and forwarded at 5½ per cent. The general agent declined to accept at less than 6½. After considerable preliminary correspondence, plaintiff wrote to the local agent, "6½ per cent. is pretty heavy, but I guess we will have to stand it, as I do not know where we can do better at present." Thereupon the local wrote to the general agent: "Please send me a ticket for \$4,000 insurance on application." A few minutes after the receipt of this letter, the general agent received

a telegram from the local agent saying, "Do not return ticket for mill insurance; it is burned." *Held*, that the letter of plaintiffs was an acceptance which completed a preliminary contract for insurance, and that the contract was sufficiently precise and complete in its terms; it was not necessary that the time should be specifically stated, — the usual time of one year was implied; nor that the kind of policy should be specified, — the usual form of policy will be presumed. *Eames v. Home Ins. Co.*, S. C. U. S., *Ib.*

8. ASSESSMENT UPON NOTES OF MUTUAL COMPANY. — LIABILITY OF INSURED. — WAIVER OF CONDITION OF POLICY. — Where there is a condition in the policy of a mutual insurance company that it shall be void if payment of the assessments upon the premium note are not made within a specified time after being levied, the company may waive the forfeiture, and the insured will remain liable for past and subsequent assessments; but the protection of the policy is suspended until the default of non-payment is removed.

The policy of a mutual insurance company contained the following condition: "Whenever an assessment has been made by the directors of this company on the premium notes of its members, if the amount assessed on the premium note given on this policy is not paid within thirty days from the time the same is demanded by said company, then this policy shall be void. But the said company shall have a right to collect the amount due on said assessment." The company made a second assessment upon a member who had failed to pay the first within the thirty days allowed. In a suit by the company to recover the amount of both assessments upon a case stated, the court below entered judgment for the company for the amount of the first assessment alone with interest. *Held*, to be error, and that judgment should be entered for the amount of both assessments with interest. *Columbia Ins. Co. v. Buckley*, S. C. Pa., W. N. C., September 27, 1877.

9. EVIDENCE. — FORFEITURE OF LIFE POLICY. — WAIVER. — A. insured his life in a mutual life insurance company, paying his initiation fee, but neglecting to pay several of the assessments levied on the death of each member. His policy therefore, in accordance with one of its conditions, became forfeited. The secretary of the company, however, acting on a rule of the company which permitted holders of lapsed policies to redeem them by paying up arrears and producing evidence of good health, continued to send A. notice of each assessment as it fell due. One of these notices was received during A.'s last illness. His brother-in-law opened it, and at once forwarded to the company's office the amount assessed. The secretary held the money, without entering it on the books of the company, and immediately wrote to A., asking an explanation of his non-payment of the previous assessments. A. was dead before this letter was written, and directly on learning this fact, the company tendered back the money to his representatives. *Held*, that these facts furnished no evidence of a waiver of the forfeiture sufficient to go to a jury. *Mutual Prot. Life Ins. Co. v. Laury*, W. N. C., September 27, 1877.

See EVIDENCE.

INTEREST.

INTEREST ON VERDICT. — When an action is brought upon an interest bearing contract, and there is a verdict for the plaintiff, and the defendant delays the giving of judgment by a motion for new trial or otherwise, the plaintiff is entitled to interest on the verdict for the time covered by the delay. *Dowell v. Griswold*, C. C. U. S. Oregon, Chicago L. N., September 29, 1877.

JUDGMENT.

FOREIGN JUDGMENT. — PLEADING. — WHEN JUDGMENT CONCLUSIVE, ETC. — A judgment in another state embracing the same matter is conclusive, although the suit in which the judgment has been obtained was begun after the one to which the judgment is pleaded in bar, and although in the former the matter was put in issue only as a set-off.

A judgment under such circumstances is well pleaded *puis darrein continuance*. Where such plea sets forth that the judgment was obtained by the receiver of the present defendant, a corporation, and that the suit was between the same parties, it will be inferred that for the purposes of such suit the receiver and the corporation were legally identical. A claim that the judgment set up in the plea has been appealed from will not be regarded unless it is properly averred in the pleadings. *Paine v. Schenectady Ins. Co.*, S. C. R. I., Am. Law Reg., September, 1877.

PLEADING AND PRACTICE.

EQUITY PLEADING. — PARTIES. — BILL TO COMPEL ACCOUNT BY TRUSTEE DE SON TORT. — A person who, as agent or bailee, obtained possession of property belonging to the trust estate, and who, after the death of the trustee, acted as trustee without authority, cannot be compelled to account by a bill in equity, filed against him by certain of the *cestuis que trustent*, in which several of the persons interested in the trust estate were not made parties, nor represented by a trustee of the whole estate. *Delbert's Appeal*, No. 3, S. C. Pa., W. N. C., September 13, 1877.

See HABEAS CORPUS; JUDGMENT.

PUBLIC POLICY.

See CONTRACT.

RAILROAD.

See CONSTITUTIONAL LAW.

RATIFICATION.

See INFANCY.

REMOVAL OF CAUSES.

PARTIES. — HOW DETERMINED. — The right to removal of a case from a state to a federal court depends upon the condition of the alleged controversy as it appears at the time of the filing of the complaint; and where the right of removal is to be determined by the fact of one of the defendants being a necessary or unnecessary party, the complaint is what

is to be looked to, to determine the question, and it is immaterial whether such defendant, in its answer, accepts or declines the issues tendered. *Lathom v. Burney*, C. C. U. S. Minn., Chicago L. N., September 29, 1877.

TAXATION.

See CONSTITUTIONAL LAW.

WILL.

CONSTRUCTION. — TRUST TO PRESERVE CORPUS FOR CONTINGENT REMAINDER-MEN. — Testator devised his estate to trustees, with active duties, in trust, *inter alia*, to pay the income to his daughters respectively (then unmarried), for their sole and separate use, during their lives, and upon their death, the corpus to their children, or issue of children, then living. *Held*, that the daughters took a life estate, with a contingent remainder in fee to the children of each living at her death, and to the issue of such as may be then deceased leaving such issue; and, also, that the will created an active trust to preserve the corpus of the estate for those who should be entitled in remainder; and that this main intent of the testator was not defeated by reason of the void limitation of the life estates for the sole and separate use of his unmarried daughters. *Delbert's Appeal*, S. C. Pa., W. N. C., September 13, 1877.

SUPREME COURT OF PENNSYLVANIA.

[FEBRUARY, 1877.]

NEGLIGENCE. — DUTY TO PUBLIC. — DANGEROUS PRIVATE WAY.

PHILADELPHIA HYDRAULIC WORKS v. ORR.

Defendant had an inclined plane or platform resting on hinges attached to his factory, which raised and lowered into a private cartway opening into the highway by a gate, which was often left open. When not in use the platform was raised and rested against the wall, not fastened or secured, so that a slight pull or jar would cause it to fall. It fell and injured a child who had strayed through the open gate into the private way. Verdict against defendant sustained.

Dickson & Bullitt for plaintiff.

R. E. Pattison & J. Cochran, contra.

AGNEW, C. J. It is true that where no duty is owed no liability arises. If, therefore, one leaves a stick of timber standing upright against his wall, or an open pit in his private yard, to which others have not access, and a person strays in without invitation, or comes in without right, and pulls down the timber upon himself, or falls into the pit, he can have no action against the owner of the yard for the alleged negligence. He had no business there, and the owner owed him no duty. But it has been often said, duties arise out of circumstances. Hence, where the owner has reason to apprehend injury owing to the peculiar situation of his property, and its openness to accident, the rule will vary. The ques-

tion then becomes one for a jury, to be determined upon all its facts, of the probability of injury, and the grossness of the act of imputed negligence. Such was the nature of the case. This building was a factory, in which several kinds of business were carried on in different stories, requiring the use of a hoisting apparatus above, and an inclined plane below, for the easy carriage of heavy articles, machinery, &c., into and out of the factory. These appliances were approached by means of a private opening or cartway, shut in by a gate, which their use required to be often opened for the ingress of wagons and hands engaged in the business. The gate and passage way opened out on a public and much frequented street, where persons were passing and children playing. Unlike an ordinary private alley, this passage was often open, and therefore liable to the incursions of children, and even grown persons, from thoughtlessness, accident, or curiosity. Now, the inclined way, which did the injury, was a dangerous trap. It was a heavy platform, weighing eight or nine hundred pounds, attached by hinges within eighteen or twenty inches of the wall, and when lowered it fell across the cartway. When not lowered it stood upright against the wall, leaning so little beyond the centre of gravity that a jar or slight pull would cause it to fall forward. Its fall, in this instance, caught four children beneath it; one had his back broken, another his hands mashed, and two escaped under the cavity. It was held by no hook or other fastening, but merely rested by its own slight weight beyond the equipoise, ready, therefore, to catch children, like mice beneath a dead fall. When wagons passed, it was often held up by hand, and a witness saw it fall against the wheels.

Now, can it be righteously said that the owner of such a dangerous trap, held by no fastening, so liable to drop, so near a public thoroughfare, so often open and exposed to the entry of persons on business, by accident, or from curiosity, owes no duty to those who will be probably there? The common feeling of mankind as well as the maxim, *Sic utere tuo ut alienum non lædas*, must say this cannot be true; that this spot is not so private and secluded as that a man may keep dangerous pits or dead-falls there without a breach of duty to society. On the contrary, the mind, impelled by the instincts of the heart, sees at once that in such a place, and under these circumstances, he had good reason to expect that one day or other some one, probably some thoughtless boy, in the buoyancy of play, would be led there, and injury would follow, especially, too, when prompted by knowledge that a fastening was needed. Perhaps the best monitor in such a case is the conscience of one who feels in his dreadful recollection the crushing sense that he had left such an engine of ill to take the life of an innocent child. Such, too, is the humanity of the law, that one may not justifiably, or even excusably, place a dangerous pitfall, or wolf trap or a spring trap, purposely to injure even wilful trespassers poaching upon his grounds. The common feeling of mankind, guided by the second branch of the great law of love, and the common sense of jurors, must be left in such a case to pronounce upon the facts. We see no error, therefore, in submitting this case on its facts to the verdict of a jury. The verdict, when approved by the court, must be permitted to stand, for we take it, no judge who sees manifest injustice done by the verdict will permit it to stand. An upright judge does his duty quite as

well when he strikes down a false and unjust verdict as when he approves of that which he cannot condemn.

Judgment affirmed.

HIGH COURT OF JUSTICE.

(37 L. T. N. S. 90.)

PLEADING. — GENERAL DENIAL. — SPECIFIC PERFORMANCE.

BYRD v. NUNN.

In an action for specific performance of an agreement to grant a lease, the statement of claim alleged that the defendant's predecessor in title made the agreement, by his lawfully authorized agent, with (H.) the plaintiff's predecessor in title. The statement of defence denied this, repeating the words of the statement of claim, and then alleged that H. was of unsound mind at the time when the agreement was alleged to have been signed, and was incapable of and did not lawfully authorize any person to sign the agreement on his behalf. *Held*, that the defendant could only produce evidence as to the state of the mind of H., and could not enter into the question as to whether the agent was authorized or not.

FRY, J. This is a claim for specific performance of an agreement entered into in 1865 by the agent of a person named Hutley, and the present question is simply whether the statement of defence has raised the issue that the agent was in fact not authorized by Hutley; and in my opinion that issue is not raised. [His lordship here read the first paragraph.] It is evident that the denial of the allegation in the claim is justified if any one of several circumstances is not true; for instance, if the agreement was entered into on the 19th of February instead of on the 25th, or if John Hutley was of No 1 High Street, and not of No. 2, and so on, through all the circumstances alleged in that paragraph. This appears to me to be exactly a case within Order XIX., Rule 22, and it is not a sufficient denial of any particular allegation. But in the latter part of the paragraph I find an allegation of the fact that Hutley was of unsound mind; and that is followed by a conclusion that in consequence of his being of unsound mind he was incapable of making an agent. This is a substantial answer, and in my opinion that does satisfy the rule, assuming that the point on which the defendant means to rely is the unsoundness of Hutley's mind. If the defendant meant to rely on anything more, I think that a substantial answer has not been given. The statement of defence denies several facts, and follows that denial by an allegation of one particular fact which justifies that denial; but there is no allegation of any other particular fact which would justify any other part of that denial. In paragraph 50 of the statement of defence there is no doubt a denial that any agreement for a lease had been entered into by John Hutley, or any person lawfully authorized by him; but that does not, as it stands, entitle the defendant to go into evidence as to the authority of the agent assuming the soundness of mind of Hutley. That allegation involves premises of law and of fact, and at least three propositions of fact: first, that Hutley was of unsound mind; secondly, that, being of unsound mind, he did not authorize his agent to contract; and, thirdly, that

the agent, though authorized, could not for some reason lawfully contract. I find, therefore, three facts which would justify this denial, and one of them alone alleged as a fact. I come, therefore, to the conclusion that that denial, being justified by a fact specifically alleged, must be taken to refer to that specific fact and not to the others. If the defendant desired to set up any other matter of fact which would have led to the same conclusion, he should have done so substantially and specifically, and should have called the attention of the plaintiff to that fact.

Fischer, Q. C., then asked for leave to amend, under Order XXVII., Rule 1, by striking out the statement that John Hutley was of unsound mind, and wished to try only the question of want of authority in the agent.

FRY, J., refused, as he did not wish the opposite party to be surprised, and be obliged to defend an issue which was only raised at the trial. It would introduce laxity in the pleadings and increase expense.

Evidence was then given as to Hutley's state of mind at the time the agreement was signed.

FRY, J., was of opinion that Hutley was in a sound state of mind at the time, and made an order for specific performance.

NOTES OF NEW BOOKS.

Messrs. LINDSAY & BARKER, of Philadelphia, have published a valuable and interesting work entitled *Forensic Medicine and Toxicology*. It is by W. BATHURST WOODMAN, M. D., &c., and CHAS. MEYMOTT TIDY, M. B., &c., and is embellished with eight full lithographic plates and one hundred and fifteen other illustrations.

Messrs. WARD & SELOUBET, of New York, will issue during November a *Digest of the Law of Trade-marks*, by CHARLES E. CODDINGTON, as presented in the reported adjudications of the Courts of the United States, Great Britain, Ireland, Canada, and France, from the earliest period to the present time. Also the United States Statutes and the Treaties of the United States concerning Trade-marks, and the Rules and Forms of the United States Patent Office for their registration. The book will present for the first time, in compact and accessible form, the adjudications of every court in which the English language is spoken, upon a subject that has grown to be a separate branch of the law. The decisions of the French tribunals are included, and although they have latterly been cited in our courts, they have not heretofore been accessible to the entire legal profession in this country. Price, \$6.50.

The same publishers have ready the first volume of HILLIARD'S *American Law*, heretofore announced.

The second volume of Judge LOWELL'S *Reports* has been published by Messrs. LITTLE, BROWN & CO. It is, *ex necessitate rei*, timely, of real value, and in every way a good work.

Messrs. BAKER, VOORHIS & CO. have ready a new edition, the tenth, of BUMP'S *Bankruptcy*.

Messrs. W. H. & O. H. MORRISON have published a new work on *Partnership*, by Prof. TYLER; also, a *Digest of the Published Opinions of the Attorney General, and of the Leading Decisions of the Federal Courts*, with reference to International Law, Treaties, and kindred subjects.

The American Student's Blackstone: Commentaries on the Laws of England, in Four Books, by Sir WILLIAM BLACKSTONE. So abridged as to retain all portions of the Original Work which are of Historical or Legal Value, with Notes and References to American Decisions, for the use of the American Student. By GEORGE CHASE, LL. B., Assistant Professor of Municipal Law in the Law School of Columbia College.

The title of this volume sufficiently explains its nature and objects, and is a sufficient argument in its favor. The book is in accord with the best tendencies of the period; it is orthodox and yet progressive. It is intelligently edited, and in almost every important particular quite up to any fair standard.

THE AMERICAN LAW TIMES.

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DIGEST OF CASES

PUBLISHED IN EXTENSO IN LATE ISSUES OF AMERICAN LEGAL PERIODICALS.

ABBREVIATIONS.

Albany L. J. — *Albany Law Journal*, Albany, N. Y., WEEK, PARSONS & CO.
Am. Law Rec. — *American Law Record*, Cincinnati, O., H. M. MOOS.
Am. Law Reg. — *American Law Register*, Philadelphia, Pa., D. B. CANFIELD & CO.
Cent. L. J. — *Central Law Journal*, St. Louis, Mo., SEYMOUR D. THOMPSON.
Chicago L. N. — *Chicago Legal News*, Chicago, Ill., CHICAGO LEGAL NEWS CO.
Ins. L. J. — *Insurance Law Journal*, New York, C. C. HINE, 176 Broadway.
Int. Rev. Rec. — *Internal Revenue Record*, New York, W. P. & F. C. CHURCH.
La. L. J. — *Louisiana Law Journal*, New Orleans, La.
Leg. Chron. — *Legal Chronicle*, Pottsville, Pa., SOL. FOSTER, JR.
Leg. Int. — *Legal Intelligencer*, Philadelphia, Pa., J. M. POWER WALLACE.
Mo. Jur. — *Monthly Jurist*, Bloomington, Ill., T. F. TIPTON.
N. B. R. — *National Bankruptcy Register*, New York, CAMPBELL & CO.
Pac. Law Rep. — *Pacific Law Reporter*, San Francisco, Cal., J. P. BOGARDUS.
Pittsb. L. J. — *Pittsburg Legal Journal*, Pittsburg, Pa., J. W. & J. S. MURRAY.
W. L. R. — *Washington Law Reporter*, Washington, D. C., JNO. L. GINCK.
W. N. C. — *Weekly Notes of Cases*, Philadelphia, KAY & BRO.
West. Jur. — *Western Jurist*, Des Moines, Iowa, MILLS & CO.

BANKS AND BANKING.

1. PRESUMPTIONS AS TO KNOWLEDGE OF DIRECTOR. — A person who holds the office of director and vice-president of a bank, and at the same time has private and personal dealings with the bank, is conclusively presumed to know, so far as the same affects his said personal dealings, the general condition and management of his bank, and to know everything of importance that occurs therein, either at the time it occurs or soon thereafter. He is bound to know when his bank is in an embarrassed condition, and the condition of an account which has been overdrawn for several months; and where the cashier gives a credit of \$2,100 to the person having such overdrawn account, for an insufficient and illegal consideration, such officer is bound to know the same within less than several days thereafter. *German Savings Bank v. Wulfkuhlees*, S. C. Kans., Cent. L. J., October 26, 1877.

2. BANK CANNOT BUY ITS OWN STOCK. — A bank, organized under the laws of Kansas, cannot purchase its own stock, except in some cases for the purpose of securing a previously existing debt. *Id.*

3. LIABILITY OF DIRECTOR. — Where W., a stockholder and also a director and the vice-president of such a bank, sells his stock of such bank while the bank is in an embarrassed condition to H., who has no funds in the bank, but, on the contrary, has an overdrawn account with the bank of several months' standing, and W. receives in payment for his stock a check for \$2,100, drawn by H. on the bank; and H. then sells said stock to the cashier of the bank, who purchases it for the bank, but who has no authority from the bank or from any one else to purchase the same for the bank, and the cashier gives to H. a credit for such stock for \$2,100 on the books of the bank, and on the same day the cashier gives to W. a credit on the books of the bank for the amount of said check and charges H. with a like amount; and several days thereafter W. draws said amount of \$2,100 out of the bank: *Held*, that the bank may maintain an action against W. for the amount of money so drawn out of the bank. And it makes no difference, in such a case, that said stock may in fact have belonged to W. and his brother as partners, and that all the transactions in selling said stock, in getting said credit, and in drawing said money out of the bank, may have been carried on in the name of the firm. The acts of the cashier in said transactions cannot estop the bank as against W., who is a director and the vice-president of the bank. *Id.*

See NATIONAL BANK.

BILLS AND NOTES.

1. WAIVER OF EXEMPTION IN JUDGMENT NOTE. — IGNORANCE OF MAKER. — NEGLIGENCE. — In the absence of any evidence of fraud or mistake a waiver of exemption contained in a judgment-note is not avoided by proof that the maker at the time he signed the note could not read it, did not inquire as to its contents and was not aware that it contained the waiver of exemption. A. signed a judgment-note containing a waiver of exemption. He testified that he could not read English, that he asked no questions concerning the contents of the note, and was not aware that it contained the waiver. There was no evidence of fraud. The jury found specially that A. did not know that the note contained the waiver. *Held*, that the waiver of exemption was not avoided by the fact of A.'s ignorance that it was contained in the note. *Adams v. Bachert*, S. C. Pa., W. N. C. November 1, 1877.

2. "PATENT RIGHT NOTES." — INVALIDITY OF STATE ENACTMENT CONTROLLING. — A state statute entitled: "An act to regulate the execution and transfer of notes or other obligations given for patent rights" consisted of two sections. The first section required all notes, and other negotiable or assignable instruments, the consideration of which, in whole or in part, consisted of the right to make, use, or vend any patented invention, to have prominently and legibly written or printed on its face the words: "Given for patent rights." Such notes were made subject to the same defence in the hands of every holder as existed against the original holder; and notes without this inscription were equally subject to such defences when the holder knew they were given for such a consideration.

The second section made it a misdemeanor to take, purchase, sell, or

transfer any such note, not so inscribed, knowing it to have been given on such a consideration. *Held*, that the act was unconstitutional and void. *Cranston v. Smith*, S. C. Mich., Cent. L. J., November 2, 1877.

4. INDORSEMENT OF NOTE BY THIRD PARTY BEFORE MATURITY, ETC. — When a promissory note, made payable to a particular person or order, is first indorsed by a third party, such third person is held to be an original promisor, guarantor, or indorser, according to the nature of the transaction and the understanding of the parties at the time the transaction took place. If he put his name in blank on the back of the note at the time it was made, and before it was indorsed by the payee, to give the maker credit with the payee, or if he participated in the consideration of the note, he must be considered as a joint maker of the note. If his indorsement was subsequent to the making of the note and to the delivery of the same to take effect, and he put his name there at the request of the maker, pursuant to a contract of the maker with the payee, for further indulgence or forbearance he can only be held as guarantor, which can only be done where there is legal proof of a consideration for the promise, unless it be shown that he was connected with the inception of the note. But if the note was intended for discount, and he put his name on the back of the note with the understanding of all the parties that his indorsement would be inoperative until the instrument was indorsed by the payee, he would then be liable only as a second indorser in the commercial sense, and as such would be entitled to the privileges which belong to such an indorser. *Good v. Martin*, S. C. U. S., Chicago L. N., November, 10, 1877.

See MANDAMUS.

CONSTITUTIONAL LAW.

See BILLS AND NOTES, 2.

CONTEMPT.

See INJUNCTION.

CORPORATION.

See BANKS AND BANKING.

EJECTMENT.

See EVIDENCE, 1, 2.

EVIDENCE.

1. JUDGMENT. — EJECTMENT. — POSSESSION. — While a judgment in ejectment is conclusive evidence that defendant was in possession on the day the writ was served, it is only *prima facie* evidence that defendant continued in possession. *Miller v. Henry*, S. C. Pa., W. N. C., November 1, 1877.

2. IN AN ACTION FOR MESNE PROFITS, AFTER A JUDGMENT IN EJECTMENT, the defendant may show that she was not in possession after the service of the writ, but merely resided on the premises as a guest or housekeeper of a co-defendant. And such evidence is not rendered inadmissible by the fact that it also tends to show that she was not in possession at the time the writ was served. *Ib.*

INJUNCTION.

CONTEMPT OF PROCESS OF STATE COURT BY RECEIVER OF FEDERAL COURT. — On the 6th of March, 1873, an injunction was granted by the state court against the Cairo and Vincennes Railroad, restraining its agents, employees, and attorneys from the use of an avenue in the city of Cairo for loading and unloading cars, from leaving them standing thereon, or making up trains, and from using railroad tracks for switching cars or trains thereon, or for any purpose other than for transit of cars and trains over their tracks, &c. This writ was served on an agent of the corporation on the next day. On the 5th of March, 1874, plaintiffs in error were appointed by the United States district court for the Southern District of Illinois, receivers of the road, and entered upon the discharge of their duties. They disregarded the injunction, and switched daily upon the forbidden track large numbers of cars to be loaded and unloaded, &c. *Held*, that the receivers acted in contempt of the state court, and are amenable thereto. The order and writ are matters of public record, of which all persons are bound to take notice at their peril, and the receivers are legally the agents of the corporation, although they are under the direction of the court appointing them. The federal court could not legally dissolve the injunction granted by the state court. *Safford v. People*, S. C. Ill., Cent. L. J., November 2, 1877.¹

See NATIONAL BANK, 1, 2.

JUDGMENT.

TORT. JUDGMENT FOR. — JOINT AND SEVERAL WRONG-DOERS. — K., on April 5, mortgaged personal property to S. to secure indorsements. S., owing defendant, assigned the mortgage to him to secure the debt. On October 4 K. gave to G. a second mortgage for \$4,000 (which was used to pay note of K. indorsed by S. and G.) on the property which also covered other property. October 12 K. sold the property for \$6,000, of which sum G. received \$3,500 and defendant \$2,500. S. paid nothing on the secured indorsements. November 2 bankruptcy proceedings were commenced against K., and plaintiff appointed assignee, who brought action against G. for the \$3,500 received by him, and another for the money paid on the notes. The first-named suit resulted in a judgment for \$4,000 which was satisfied, and the second was settled for \$2,000 and G. was released. *Held* (1), that though the mortgage to S. was originally valid, he having paid nothing, the sum paid to defendant on it was a preference, and defendant liable to the assignee therefor; and (2) that the judgment against G. and its satisfaction and the release did not bar

¹ Concerning the opinion in this case the editor of the *Central Law Journal* writes as follows: "The opinion is written in heated language, and cites no authorities. It is, in our judgment, a complete judicial *faux pas*. It proceeds upon the false premise that a receiver is the agent of a corporation whom he dispossesses. A receiver is the agent of no one ex-

cept the court by which he is appointed, and no other court can, without consent of that court, exercise any more authority over him than it can exercise over the judge of the court whose agent he is. We are profoundly astonished that such a decision should proceed from any appellate bench in the United States." — EDITOR.

an action therefor against defendant. *Sessions v. Johnson*, S. C. U. S., Albany L. J., October 27, 1877.

See BILLS AND NOTES, 1.

JUDGMENT NOTE.

See BILLS AND NOTES, 1.

MANDAMUS.

SCHOOL BOARD. — POWER TO RECEIVE DRAFT, ETC. — W. desired to purchase some school bonds, and on September 10 sent a draft on J. C. & Co., in payment therefor, to the order of "School Board, Muncy, Pa." The draft was received at a special meeting of the board, on September 13, in the absence of the treasurer, and bonds were ordered to be issued on payment of the draft. The draft was handed to the treasurer on his return after bank hours on September 16, and was sent by him properly endorsed, on the 17th, for collection, to his bank at W., some eleven miles from Muncy on the road to Philadelphia. Owing to a delay in the mail, the draft was not received by the W. bank until the evening of September 18. On September 20 the draft was presented for payment, and protested, the drawees having failed on September 18. In a mandamus by W. against the School Board to compel an issue of bonds: *Held*, that the respondents were guilty of no laches in the presentation of the draft. *Muncy, &c., District v. Commonwealth*, S. C. Pa., W. N. C., October 25, 1877.

MARRIED WOMAN.

1. MORTGAGE OF MARRIED WOMAN. — While the bond and mortgage, or judgment, given by a married woman to secure purchase money will be enforced against the land, upon the equitable principle that she may not withhold the price and retain the land, such instrument creates no personal obligation on the part of the married woman, and gives the holder no right to participate in the distribution of her estate in the hands of her administrator. *Sawtelle's Appeal*, S. C. Pa., W. N. C., October 25, 1877.

2. CLAIMS FOR MEDICAL SERVICES RENDERED TO a married woman are not good against her separate estate, unless it is proved that they were rendered at her request and on her credit. *Ib.*

MASTER AND SERVANT.

EMPLOYMENT OF SERVANT BY JOINT MASTERS. — T. was employed as a signal-man by the G. Railway Company at a station which abutted upon a station of the N. Railway Company. The business of T. was common to both stations, and was to signal the trains of both companies, and he was called one of the joint-station staff, all of whom were appointed and paid by the G. Company, but the expenses of their salaries was borne equally by the two companies. *Held*, that he was employed as the servant of both companies, and the N. Company was not liable for his death through the negligence of one of its servants. *Swainson v. North Eastern Railway Co.*, High Ct. England, Albany L. J., October 13, 1877.

MEDICAL SERVICES.

See MARRIED WOMAN, 2.

MORTGAGE.

See MARRIED WOMAN, 1.

NATIONAL BANK.

1. ENJOINING TAXATION OF NATIONAL BANK SHARES. — WHEN BANK A PROPER PARTY. — A bank is a proper party complainant to a bill in equity, to enjoin the collection of a tax upon its shares, assessed against its stockholders, if it be shown that the bank would be subjected to a multiplicity of suits, whereby its business will be interfered with, its credit impaired, and its stock depreciated. *City National Bank of Paducah v. City of Paducah*, C. C. U. S. Ky., Cent. L. J., October 19, 1877.

2. INJUNCTION TO STAY TAX. — GROUNDS OF. — MULTIPLICITY OF SUITS. — The remedy by injunction to stay the collection of a tax upon personal property may be invoked where the enforcement of the tax would lead to the multiplicity of suits, or where the law authorizing the tax is itself invalid. *Ib.*

3. TAXATION OF NATIONAL BANK SHARES. — RATE OF TAXATION. — Where, by the laws of a state or municipality, different rates of taxation are imposed upon different classes of moneyed capital, such state or municipality may not tax the shares of national banks at the *highest rate* imposed upon *any class*, regardless of the proportion which that class bears to other classes; nor, upon the other hand, is it confined to the lowest rate imposed upon any class. Where different rates of taxation are prescribed for different classes of "other moneyed capital," the rate imposed upon shares in national banks should not, as a general rule, exceed that imposed upon other moneyed capital of the same class, viz.: shares in state banks. Where practically the entire banking capital of the State of Kentucky was exempted from taxation, beyond fifty cents per share, and included in this enumeration was a state bank in Paducah, the capital stock of which exceeded that of all the national banks located there, it was *held* that an ordinance imposing a tax of \$1.05, nominally upon all banks in the city, but from which the state banks had been adjudged exempt, was an unlawful discrimination against the national banks, and therefore invalid. *Ib.*

4. *IBID.* — DEDUCTION OF SHAREHOLDER'S INDEBTEDNESS. — Where other moneyed capital than bank stocks was also taxed at \$1.05, but with a proviso that, from the amount of this capital, the entire indebtedness of the owner should be deducted before the assessment was made, and no such deduction was allowed where such capital consisted of shares in national banks, the tax upon such shares was held invalid. *Ib.*

5. *IBID.* — DEDUCTING REAL ESTATE OWNED BY BANK. — DOUBLE TAXATION. — The tax was also held invalid for the reason that no provision was made for deducting the value of real estate owned by the bank, which was thereby subjected to double taxation. *Ib.*

NEGLIGENCE.

EJECTION OF PASSENGER. — RETENTION OF PASSENGER'S MONEY BY CONDUCTOR. — CONTRIBUTORY NEGLIGENCE. — DUTY OF CONDUCTOR, ETC. — The plaintiff took a seat in a railroad car to be carried to the next station on defendant's road, but not having the usual fare for that point, twenty-five cents, handed the conductor a five dollar bill out of which to take the fare. The conductor was unable to make change, but promised to do so at the next station. On arriving there, which was the end of his journey, the plaintiff seeing the conductor getting on the train and starting it without giving him his change, ran after the train and got onto the car as it was moving from the station, for the sole purpose of getting his money. The conductor, on demand for his change, handed him back the same bill, and, as plaintiff claimed, told him to get off the train as quickly as possible, which he did, and was thereby injured. It did not appear that the remark of the conductor caused the plaintiff to act differently from what he otherwise would have done, nor that he requested that the train should be stopped or slackened up to enable him to get off in safety. *Held*, (1) that at the time of the accident the relation of passenger and carrier did not subsist between the plaintiff and defendant; (2) that at the time of the accident the duties and obligations of the company towards the plaintiff were such as existed in his favor as one of the general public growing out of the failure of the conductor to return him his money; (3) the nature and effect of the remark of the conductor and the action of defendant in leaving the train were questions for the jury. It was error for the court to charge the jury that if the conductor ordered or directed the plaintiff to get off the train, or told him to get off as quick as he could, while the same was moving, without stopping it or slackening its speed, then the defendant would be liable for injuries resulting from jumping off, provided in so jumping he exercised due care and prudence. 1st. Because such charge assumed as a matter of law for the court, and not of fact for the jury, that such an order or remark caused the plaintiff to leap from the train while in motion; and 2d. Because it took from the jury not only the question of liability of the defendant, but also the question of contributory negligence of the plaintiff as to the act of jumping off, and, as matter of law, made the company liable for all consequences, however imprudent the act might have been, although voluntary, if the *mode* and *manner* of jumping were prudent. — *Krouse v. Pittsburg, Cin., & St. L. R. R. Co.*, S. C. Ohio, Cent. L. J., October 19, 1877.

See **BILLS AND NOTES, 1; MASTER AND SERVANT.**

PATENT.

See **BILLS AND NOTES, 2.**

PAYMENT.

PRESUMPTION FROM LAPSE OF TIME. — It is a question for the court whether a given state of undisputed facts will rebut such a presumption as that of payment from lapse of time. To a *scire facias sur recogni-*

zance issued in 1874 by K., the administrator of the obligee, B., pleaded payment, and testified that he had entered into the instrument sued on in 1839, and in 1840 paid the full amount of the debt to the clerk of the court in which the recognizance was given. He further testified that from 1840 to the beginning of the action he had frequently met the obligee, who had never mentioned the debt. There was no contradictory evidence, and no evidence of B.'s insolvency at any time. *Held*, that the original presumption of payment from lapse of time was not rebutted through B.'s admission of payment to an unauthorized person, but that, under the evidence, it was to be presumed that the money paid to the clerk had been received by the obligee. — *Beale's Ex. v. Kirk*, S. C. Pa., W. N. C., October 11, 1877.

PRACTICE.

GENERAL AND SPECIFIC INSTRUCTIONS. — Where the court in its general charge to the jury correctly states the general principles applicable to cases of the kind on trial, but follows it by an erroneous specific instruction on a controlling point, as to the legal effect of the case made by the evidence before the jury, which, if followed, misleads the jury, such erroneous specific charge is not cured by the general charge. *Krouse v. Pittsburg, Cin., & St. L. R. R. Co.*, S. C. Ohio, Cent. L. J., October 19, 1877.

See NATIONAL BANK, 1, 2; NEGLIGENCE.

RECEIVER.

See INJUNCTION.

REMOVAL OF CAUSES.

POWER OF STATE COURT IN VACATION. — A cause was referred to a referee under the statute of Iowa for trial, in *vacation*. A petition, affidavit and bond were filed in the office of the clerk of the state court, under the Rev. Stats. sec. 539, subdivision 3, for the removal of the cause to the federal court. *Held*, not to have the effect to divest the jurisdiction of the state court, or of the referee to proceed to a trial pursuant to the order of reference. Under section 639 of the Revised Statutes, a removal of a cause cannot be effected in vacation, without any action of the state court. *Scott v. Otis*, C. C. U. S. Iowa, Chicago L. N., October 27, 1877.

TORT.

See JUDGMENT.

VOLUNTARY PAYMENT.

COERCION IN FACT AND BY LAW DEFINED. — Money involuntarily paid on an illegal assessment may be recovered back. If the assessment is regular on its face, so that its collection can be enforced by seizure or sale, and evidence *aliunde* is necessary to show its invalidity, money paid thereon is paid involuntarily or by coercion by law. *Peyser v. The Mayor*, Ct. App. N. Y., Albany L. J., October 29, 1877.

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NOTE. In place of the Annual Digest of the twelve numbers of THE AMERICAN LAW TIMES published during the year, which has usually been prepared for the bound volume of the REPORTS, the following Index to the numbers for 1877 is given, in the belief that it will practically serve the same purpose. In binding the REPORTS for 1877, the TIMES with this Index will be included at the back of the volume, in place of the Annual Digest.

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